Jurisdictional Statement

81-5827

RECEIVED
DEC 7 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. _____

IN RE: NORMA TURNER

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

LESTER C. WISOTSKY
COUNSEL FOR APPELLANT
LEGAL SERVICES OF GREATER
MIAMI, INC.
NORTHSIDE SHOPPING PLAZA
2700 NORTHWEST 79th STREET
149 WEST PLAZA, SUITE 210
MIAMI, FLORIDA 33147
TELEPHONE (305)693-6810

INDEX

	PAGE
OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISIONS AND STATUTES	3
RAISING THE FEDERAL QUESTION	4
STATEMENT OF THE CASE	4
THE QUESTION IS SUBSTANTIAL	4
CONCLUSION	11
*APPENDIX	12

*(PORTIONS OF APPX ON FILE IN CLERK'S OFFICE)

CITATIONS

CASES

ADDINGTON v. TEXAS
441 U.S. 418 (1979) 5

APPLICATION OF PRESIDENT AND DIRECTORS OF GEORGETOWN COLLEGE,
331 F.2d 1010 (D.C. Cir. 1964) 8

EISENSTADT v. BAIRD,
405 U.S. 438 (1971) 4

ERICKSON V. DILGARD,
252 N.Y.S.2d 705 (S.Ct., Sp. Term, 1962) 9

GRISWOLD v. CONNECTICUT,
381 U.S. 479 (1965) 4

HAWAII v. STANDARD OIL CO.,
405 U.S. 251 (1971) 7

HUMPHREY v. CADY,
405 U.S. 504 (1972) 5,6

IN RE BROOKS' ESTATE,
205 N.E.2d 435 (Ill. 1965) 8,10

IN RE GAULT,
387 U.S. 1 (1967) 5,6,7

IN RE OSBORNE,
294 A.2d 372 (D.C.App. 1972) 9

MATTER OF MELIDEO,
390 N.Y.S.2d 523 (S.Ct., Sp. Term, 1976) 9

MATTER OF QUINLAN,
355 A.2d 647 (N.J. 1976) 9

MATTER OF SCHILLER,
372 A.2d 647 (N.J. Sup. Ct. 1976) 9

O'CONNOR v. DONALDSON,
442 U.S. 563 (1975) 5,6

PARHAM v. J.R.,
442 U.S. 584 (1979) 5,6

ROE v. WADE,
410 U.S. 113 (1973) 4,10

SPECHT v. PATTERSON,
386 U.S. 605 (1967) 5

STANLEY v. GEORGIA,
394 U.S. 557 (1969) 4

SUPERINTENDENT OF BELCHERTOWN
v. SAIKEWICZ,
370 N.E.2d 417 (Mass. 1977) 8

FLORIDA STATUTES:

§ 410.102(1), Fla. Stat. 1
§ 410.102(6), Fla. Stat. 8,10
§ 410.104, Fla. Stat. 1,3,4
"ADULT PROTECTIVE SERVICES ACT,"
§§ 410.10-410.11, Fla. Stat. 1,2,3,5,
6,7,10,11

CONSTITUTIONAL PROVISIONS:

FOURTEENTH AMENDMENT,
UNITED STATES CONSTITUTION 1

RIGHT TO PRIVACY 8,10

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. _____

IN RE: NORMA TURNER

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

NORMA TURNER appeals from the decision of the Supreme Court of Florida, affirming the judgment of the trial court that the "Adult Protective Services Act," §§ 410.10-410.11 of the Florida Statutes, is not violative of the Due Process Clause of the Fourteenth Amendment and the right to privacy provided by the Constitution of the United States.

Section 410.104, Florida Statutes, authorizes the State Department of Health and Rehabilitative Services to take elderly persons suffering from the infirmities of aging, as defined in § 410.102(1), Fla. Stat., into custody and to transport them to a medical or protective services facility in an emergency situation without their consent and to involuntarily confine them in accordance with the procedures set out in § 410.104, Fla. Stat.

The "Adult Protective Services Act" does not comport with procedural due process in that it fails to provide the elderly individual involuntarily confined with written notice of specific charges or factual allegations given sufficiently in advance of the hearing to permit preparation and advising the individual of his right to appear, or to notify the elderly individual of his right to be represented by counsel retained by the individual, or, if unable to afford counsel, that counsel will be appointed by the court to represent him.

The Act also violates substantive due process, and the right to privacy, in that the State of Florida lacks the authority under its parens patriae power, to involuntarily remove elderly persons from their homes, and to force services and confinement upon competent, non-mentally ill elderly persons.

Since the decision of the Florida Supreme Court is in contravention of numerous decisions by this Court and other federal and state courts, it is erroneous and presents grounds for plenary review by this Court.

OPINIONS BELOW

The corrected Order Denying Motion to Dismiss rendered on June 13, 1979, by the Circuit Court of Dade County, Florida, disposing of the motion raising the issues decided by the Supreme Court of Florida, is unreported. It is reproduced in the appendix, pp.10-11, infra.

The opinion of the Supreme Court of Florida, which appears in the appendix, pp.76-79, infra, is reported at 402 So.2d 383 (Fla. 1981).

JURISDICTION

The decision of the Supreme Court of Florida, upholding the constitutionality of the Act attacked, was rendered on June 25, 1981. See appendix, pp.76-79, infra. A Motion for Rehearing was entertained and denied on September 9, 1981. See appendix, p.80, infra.

A Notice of Appeal was timely filed in the Supreme Court of Florida. See appendix, pp.81-82, infra.

This appeal is being docketed in this Court within 90 days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

QUESTION PRESENTED

Whether the "Adult Protective Services Act," §§ 410.10-410.11 of the Florida Statutes, is violative of the Due Process Clause of the Fourteenth Amendment and the right to privacy provided by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourteenth Amendment, United States Constitution

[N]or shall any state deprive any person of life, liberty, or property, without due process of law ... .

§ 410.104, Fla. Stat.

(1) Upon probable cause to believe that an individual suffering from the infirmities of aging is being abused, maltreated, or neglected, a representative of the department, accompanied by a law enforcement officer, may enter a premises, after obtaining a court order and announcing their authority and purpose. Forcible entry shall be obtained only after a court order has been obtained, unless there is probable cause to believe that the delay incident to obtaining such an order would cause an individual suffering from the infirmities of aging to incur a substantial risk of life-threatening physical harm.

(2) When, from the personal observation of a representative of the department and a law enforcement officer, it appears probable that an individual suffering from the infirmities of aging is likely to incur a substantial risk of life-threatening physical harm or deterioration if not immediately removed from the premises, the department's representative may, when authorized by court order, take into custody or transport or make arrangements for the transportation of, the individual to an appropriate medical or protective services facility.

(3) When action is taken under this section, a preliminary hearing shall be held within 48 hours, excluding Saturdays, Sundays, and legal holidays, to establish probable cause for grounds for protective placement.

(4) Upon a finding of probable cause, the court may order temporary placement for up to four days, pending the hearing for a need for continuing services.

(5) When emergency services are rendered, a report of the exact circumstances, including the time, place, date, factual basis for the need for such services, and the exact services rendered, shall be made and forwarded as provided in s.827.09

The Adult Protective Services Act, §§ 410.10-410.11 of the Florida Statutes, is reproduced in its entirety in the appendix, pp.83-85, infra.

The right to privacy, recognized as constitutional in dimension. See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965); Stanley v. Georgia, 394 U.S. 557 (1969); Eisenstadt v. Baird, 405 U.S. 438 (1971); Rowe v. Wade, 410 U.S. 113, 153 (1973).

RAISING THE FEDERAL QUESTIONS

The Appellant raised the federal questions at the earliest possible stage of these proceedings in a Motion to Dismiss in the Dade County Circuit Court proceeding. See appendix, pp.6-7, infra. (The violation of the right to privacy argument was not incorporated in the written Motion to Dismiss, but was asserted in open court in the oral argument on the Motion to Dismiss attacking the constitutionality of the Act; see p.5 of Transcript II of the hearing (the transcripts of the hearing are paginated separately), appendix, p.35, infra).

The federal claims were specifically passed upon and rejected by the Circuit Court of Dade County, Florida, in its Corrected Order Denying Motion to Dismiss, appendix, pp.10-11, infra, and on appeal by the Supreme Court of Florida. See appendix, pp.76-79, infra.

STATEMENT OF THE CASE

On June 6, 1979, a social worker in the employ of the State Department of Health and Rehabilitative Services filed a Petition for an Emergency Order of Custody, pursuant to § 410.104, Fla. Stat. See appendix, pp.1-2, infra. The court immediately, on June 6, 1979, ex parte issued an Order for Emergency Custody. See appendix, pp.3-4, infra. On the following day, (June 7, 1979), after a phone call from the state social worker to Legal Services, who then contacted the Public Defender, at the instance of the State Public Defender (see p.7 of Transcript I of the hearing, appendix, p.26, infra), the court appointed counsel for NORMA TURNER. See appendix, p.5, infra.

On June 8, 1979, attorneys for NORMA TURNER filed a Motion to Dismiss the Petition contending that the procedures provided by § 410.104 Fla. Stat. are unconstitutional. See appendix, pp.6-7, infra. On hearing, the court denied the Motion to Dismiss. However, the court found that the State of Florida failed to present sufficient evidence to meet its burden of proof that there was probable cause to

believe that NORMA TURNER suffered from the infirmities of aging and ordered her immediate release and discharge. See hearing transcript II, pp.42-45, appendix, pp.72-75, infra. On June 13, 1979, the court issued a written Corrected Order Denying the Motion to Dismiss (see appendix, pp.10-11, infra) and entered a written judgment for NORMA TURNER's discharge. See appendix, pp.12-13, infra!

An appeal ensued in which the Florida Supreme Court in its decision affirmed the denial of the Motion to Dismiss and upheld the constitutionality of the "Adult Protective Services Act," §§ 410.10-410.11 of the Florida Statutes. See appendix, pp.76-79, infra.

THE QUESTION IS SUBSTANTIAL

The question of whether the "Adult Protective Sservices Act," §§ 410.10-11 of the Florida Statutes is constitutional, is a substantial one.

It is substantial because the Act fails to comport with the requirements of procedural due process as set forth in numerous decisions by this Court. Specht v. Patterson, 386 U.S. 605 (1967); In re Gault, 387 U.S. 1 (1967); Humphrey v. Cady, 405 U.S. 504 (1972); O'Connor v. Donaldson, 422 U.S. 563 (1975); Addington v. Texas, 441 U.S. 418 (1979); Parham v. J.R., 442 U.S. 584 (1979).

As stated in In re Gault, supra, at 20-21,

> Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise. As Mr. Justice Frankfurter has said: "The history of American freedom is, in no small measure, the history of procedure." But in addition, the procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. "Procedure is to law what 'scientific method' is to science."

The deprivation of liberty which results from confinement under a state's involuntary commitment law has been termed "a massive curtailment of liberty." Humphrey v. Cady, supra, at 509. "It is not disputed that ... adults ha[ve] a substantial liberty interest in not being confined unnecessarily ... and that the state's involvement in the commitment decision constitutes state action under the Fourteenth Amendment ... ." Parham v. J.R., supra, at 600.

This Court stated, in O'Connor v. Donaldson, 422 U.S. 563, 583 (1975),

> There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the state cannot accomplish without due process of law. Specht v. Patterson, 386 U.S. 605, 610 (1967). (Emphasis supplied.) Parham, supra, at 627; Mr. Justice Brennan concurring.

Due process requires written notice of specific charges or factual allegations given sufficiently in advance of the hearing to permit preparation and advising the individual of his right to appear. In re Gault, supra, at 31-34. Due process also requires that in respect to a proceeding which may result in commitment, that the subject of the proceeding be notified of his right to be represented by counsel retained by the subject, or, if unable to afford counsel, that counsel will be appointed by the court to represent him. In re Gault, supra, at 34-41.

It is constitutionally immaterial that under the "Adult Protective Services Act" an individual may be confined only temporarily, and that the Act is couched in benevolent terms of protective services and placement. In In re Gault, supra, involving juvenile delinquency proceedings, this Supreme Court stated,

> The boy is committed to an institution where he may be restrained of [his] liberty .... It is of no constitutional consequence ... that the institution is called an Industrial School. The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or less time. In re Gault, supra, at 27.

Nor can it be urged on this Court that NORMA TURNER was not, in fact, denied her opportunity to appear and be represented by counsel in this case and thus afforded procedural due process. What

happened in this case, the fortuitous notice and appointment of counsel, cannot rectify the deficiencies of the "Adult Protective Services Act." The Act does not itself provide the safeguards required by procedural due process. And, this Court has consistently made it plain that adequate and timely notice in the fulcrum of due process, whatever the purpose of the proceeding. Notice is ordinarily the prerequisite to effective assertion of any constitutional or other right; without it, vindication of those rights must be essentially fortuitous. "So fundamental a protection can neither be spared ... nor left to the 'favor or grace' of state authorities." In re Gault, supra, at 73; Justice Harlan concurring.

In In re Gault, supra, the juvenile being proceeded against was in fact represented by counsel in the state court proceeding and oral notice had been provided by court personnel. The Supreme Court nevertheless held that the statutory scheme under which the proceeding was held was constitutionally infirm because it failed itself to require adequate written notice.

In the case at bar, the fortuitous notice and appointment of counsel cannot take the place of the statutory guarantee of these safeguards. The failure of the "Adult Protective Services Act" to itself provide for written notice and the provision of counsel, renders the Act unconstitutional.

The question of whether the "Adult Protective Services Act," §§ 410.10-410.11 of the Florida Statutes, is constitutional, is also substantial because it violates the doctrines of substantive due process and the constitutional right to privacy as established by the courts.

The parens patriae power which is vested in the state is used as the basis for state laws which protect the interests of minors, establish guardianships and provide for the involuntary commitment of the mentally ill. See e.g., Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1971).

The question presented to this Court is whether this power enables the state to involuntarily remove elderly persons from their homes and confine and order services for such elderly persons (pursuant to the Act in question), who are neither incompetent, nor even mentally ill, even when incurring a substantial risk of life-threatening

harm or deterioration if the services are not provided, (§ 410.102(6), Fla. Stat.), or whether the Act oversteps the limits of the parens patriae power and thus violates substantive due process and the individual's constitutional right to privacy which guarantees his or her right to free choice and self-determination and protects the decision to refuse services.

The right to refuse services is akin and exactly analogous to the right to refuse medical treatment, even in a life-threatening situation. Numerous court decisions have addressed the right to refuse treatment and the individual's constitutional right to privacy. In Superintendent of Belcher town v. Saikewicz, 370 N.E.2d 417, 424 (Mass. 1977), the court stated,

> Of even broader import [than the doctrine of informed consent], but arising from the same regard for human dignity and self-determination is the unwritten constitutional right of privacy found in the penumbra of specific guarantees of the Bill of Rights. Griswold v. Connecticut, 381 U.S. 479, 484, 85 S.Ct. 328, 12 L.Ed.2d 339 (1965). As the constitutional guarantee reaches out to protect the freedom of a woman to terminate pregnancy under certain conditions, Roe v. Wade, 410 U.S. 113, 153, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), so it encompasses the right of the patient to preserve his or her right to privacy against unwanted infringements of bodily integrity ... .

In In re Brooks' Estate, 205 N.E.2d 435 (Ill. 1965), the court upheld the right of a patient to refuse a medically necessary blood transfusion. The court stated,

> Even though we may consider appellant's beliefs unwise, foolish or ridiculous, in the absence of an overriding danger to society we may not permit interference therewith ... compelling her to accept medical treatment ... previously refused by her with full knowledge of the probable consequences. In final analysis, what has happened here involves a judicial attempt to decide what course of action is best for a particular individual, notwithstanding that individual's contrary views ... . Such action cannot be constitutionally countenanced. In re Brooks' Estate, supra, at 442.

In Application of President and Directors of Georgetown College, 331 F.2d 1010 (D.C. Cir. 1964), Mr. Justice Berger, now Chief Justice of this Court, wrote an opinion disapproving of the action of the District

Court Judge in ordering an involuntary blood transfusion, even though the case was then moot, to guide courts in the future. He wrote,

> Mr. Justice Brandeis, whose views have inspired much of the "right to be let alone" philosophy, said in Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928), (dissenting opinion):
>
> "The makers of our Constitution ***sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the government the right to be let alone - the most comprehensive of rights and the right most valued by civilized men."
>
> Nothing in this utterance suggests that Justice Brandeis thought an individual possessed these rights only as to sensible beliefs, valid thoughts, reasonable emotions, or well-founded sensations. I suggest he intended to include a great many foolish, unreasonable, and even absurd ideas which do not conform, such as refusing medical treatment even at great risk. Application of President and Directors of Georgetown College, supra, at 1016-1017.

Mr. Justice Berger posed the question of whether, when a patient is in critical condition requiring in the minds of experts, a certain medical procedure, are the courts empowered to decide for him? Mr. Justice Berger raised the need for an awareness of the limits on judicial power and urged the restraint on the courts. He concluded,

> [W]e should reconcile ourselves to the idea that there are myriads of problems and troubles which judges are powerless to solve; and this is as it should be. Some matters are of essentially private concern and others of enormous public concern, are beyond the reach of judges. Application of President and Directors of Georgetown College, supra, at 1017-1018.

In accord, Erickson v. Dilgard, 252 N.Y.S.2d 705 (S.Ct., Sp.Term, 1962); In re Osborne, 294 A.2d 372 (D.C.App. 1972); Matter of Quinlan, 355 A.2d 647 (N.J. 1976); Matter of Melideo, 390 N.Y.S.2d 523 (S.Ct. Sp.Term, 1976); Matter of Schiller, 372 A.2d 360 (N.J.Sup.Ct. 1977).

Of course, the right to privacy is not absolute. The state has a countervailing legitimate interest in the preservation of life. Roe v. Wade, supra, 152-156, 162-163. However, unless this countervailing state interest rises to the level of being compelling, or there is an

overriding danger to society, the state's interest in the preservation of life cannot override the individual's right to self-determination. E.g. Roe v. Wade, supra, at 142-156, 162-163; In re Brooks' Estate, supra, at 442. And, no such compelling state interest or danger to society is presented in this proceeding or any proceeding governed by the "Adult Protective Services Act."

It is submitted that just as the constitutional right to privacy protects the competent individual from unwanted medical treatment, and interference with such a determination by the courts, even when the individual is in critical condition and death is imminent if treatment is not given, that the constitutional right to privacy protects the individual from involuntary removal from the home by the state and subsequently being subjected to involuntary confinement and unwanted services, pursuant to the "Adult Protective Services Act," §§ 410.10-410.11 of the Florida Statutes, even though benevolently motivated, and even in a situation of "substantial risk of life-threatening harm or deterioration if services are not provided." Section 410.102(6), Fla. Stat.

An outside observer might believe that the living environment of NORMA TURNER was poor, even abhorrent. (However, had the case not been dismissed at the conclusion of the state's presentation, counsel for NORMA TURNER were prepared to put on a case and to make a full and complete record, including an explanation of some of the conditions existing at her home such as the absence of clothing. The heat in the home, in June, in Miami - temperature in excess of 95° with 90% humidity - made it quite the prudent decision.)

NORMA TURNER was competent. If she preferred her home, such as it was, to an institution (and the doctors present at the hearing were prepared to testify that she belonged home), which was certainly the case, and she did not want the state interfering in her life, it is submitted that the state lacked the authority to substitute its judgment for hers.

If, however, this Court determines that the state has such parens patriae power over competent, but infirm, elderly persons, then the state must at least be required by this Court to comply with the notice,

right to counsel, and fair hearing requirements of procedural due process in "Adult Protective Services Act" proceedings.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

LEGAL SERVICES OF GREATER MIAMI, INC.

BY _____

LESTER C. WISOTSKY
ATTORNEY FOR APPELLANT
NORTHSIDE SHOPPING CENTER
2700 N. W. 79th Street
149 West Plaza, Suite 210
Miami, Florida 33147
Telephone (305) 693-6810

Appendix

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT OF FLORIDA, IN AND
FOR DADE COUNTY

PROBATE DIVISION - MENTAL HEALTH

CASE NO. 79-4303 - G

IN: Norma B. Turner)
DOB 10/19/12)
)
)
)
)

PETITION FOR EMERGENCY ORDER PURSUANT
TO SECTION 402.3035, FLORIDA STATUTES

The undersigned Petitioner, Lucile Greville, a Social Worker employed by the FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, respectfully prays for the entry of an Ex Parte Order for Emergency Custody and Transport of Norma B. Turner stating as follows:

1. Norma B. Turner is a resident of Dade County, Florida, whose address is [redacted].

2. Norma B. Turner is [redacted] years of age and is suffering from the infirmities of aging and otherwise meets the statutory criteria of Chapter 77-330(5), Florida Statutes for an Ex Parte Order.

3. It appears probable to the undersigned that if Norma B. Turner is not immediately removed from the premises he/she will likely incur a substantial risk of life threatening physical harm and deterioration: more specifically as follows:

When I visited Mrs. Turner on 6/[illegible]/79 I found her home surrounded by [illegible] excrement. There was an absence of nourishment and sanitary conditions around her. The client is an invalid and is totally unable to [illegible] not fully realized what her immediate environment is. The food [illegible] drawn and there stacks of garbage in the room.

4. The undersigned has been working in coordination with a law enforcement officer who agrees with Petitioner's opinion.

5. Petitioner plans to transport Doris D. Turner

his/her premises at 1170 N. W. 76th Avenue, Miami

Jackson Memorial Hospital located at 1700 N. W. 12th Avenue
(name of facility)

upon obtaining the Court's approval.

Petitioner

Dated:

SWORN AND SUBSCRIBED BEFORE ME, A NOTARY PUBLIC, THIS 6th

DAY OF June, 1978, A.D. 1978

Notary Public

Best Copy Available

JUDICIAL CIR[illegible] FOR DADE COUN

PROBATE DIVISION - MENTAL HEALTH

CASE NO.

IN RE: Norma B. Turner
DOB 10/17/12

EX PARTE ORDER FOR EMERGENCY CUSTODY AND TRANSPORT
PURSUANT TO CHAPTER 77-335, FLORIDA STATUTES (397.035)

THIS MATTER CAME ON BEFORE the undersigned Judge by sworn petition for the entry of an Ex Parte Emergency Order for the FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES to take [illegible] residing at [illegible] Dade County, Florida into custody to be transported to an appropriate medical or protective services facility.

THE COURT FINDS that [illegible] appears to meet the statutory criteria of being an individual sufficiently that the immediate of agent and being likely to incur a substantial risk of his then existing mental harm and deterioration if not immediately removed from alleged premises.

It is therefore:

ORDERED AND ADJUDGED that the DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES together with any law enforcement officer having jurisdiction to make arrests in this County shall immediately take the said [illegible] from his/her position at [illegible] Dade County, Florida into custody and transport to [illegible] or other appropriate medical facility for emergency observation, examination and care.

IT IS FURTHER ORDERED AND ADJUDGED that [illegible]

48 hours pending a further hearing herein on the ____ day of June, 1979 at 11:10 o'clock am. for the purpose of establishing probable cause.

DONE AND ORDERED this 6th day of June, 1979. , 1978 at a

EMERGENCY TELEPHONIC HEARING.

John R. Blanton
CIRCUIT JUDGE

Best Copy Available

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT OF FLORIDA, IN AND
FOR DADE COUNTY

PROBATE DIVISION - MENTAL HEALTH

CASE NO. 77-4063

IN RE: Norma B. Turner

ORDER APPOINTING COUNSEL

This matter being before the Court for consideration pursuant to Chapter 409.3035, Florida Statutes, it is therefore,

ORDERED

1. Public Defender an attorney practicing in Miami, Florida, is hereby appointed counsel to represent Norma B. Turner in all proceedings before under Chapter 409.3035, Florida Statutes.

2. The County of Dade will pay reasonable attorney's fees to be determined after a hearing thereon by the Judge in Dade County, Florida.

ORDERED at Miami, Florida this 7th day of October, 1977.

Stanley R. Pleus
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF
FLORIDA, IN AND FOR DADE COUNTY

PROBATE DIVISION

CASE NO. 79-4093 - C J

IN RE:

Norma Turner

MOTION TO DISMISS

RESPONDENT, by and through her undersigned counsel, moves this Honorable Court to dismiss the petition for emergency services pursuant to Florida Statute §410.104 (Supp. 1978) and states the following grounds:

1. Florida Statute §410.104 (Supp. 1978) is unconstitutional on its face and as applied since said statutes deprive respondent of her liberty in violation of due process and equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article I, Sections 2 and 9 of the Florida Constitution.

2. Florida Statute §410.104 (Supp. 1978) is unconstitutional on its face and as applied since said statute denies respondent procedural and substantive due process rights as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article I, Section 9 of the Florida Constitution.

3. Florida Statute §410.104 (Supp. 1978) is unconstitutional on its face and as applied since said statute is vague and indefinite in violation of due process as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article I, Section 9 of the Florida Constitution.

4. Florida Statute §410.104 (Supp. 1978) is unconstitutional on its face and as applied since said statute denyies respondent to the right to counsel as guaranteed by the Sixth Amendment to the United States Constitution.

WHEREFORE, respondent requests this court to enter an order dismissing said petition and discharging respondents from custody of the Department of

Health and Rehabilitative Services and further declaring Florida Statute §410.104 (Supp. 1978) unconstitutional on its face and as applied based on the foregoing grounds.

Respectfully submitted,

BARRY A. WEINSTEIN
Assistant Public Defender

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Dismiss has been hand-delivered to a representative of the Department of Health and Rehabilitative Services this 8th day of June, 1979.

BARRY A. WEINSTEIN
Assistant Public Defender

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA.

PROBATE DIVISION - MENTAL HEALTH

CASE NO. 79-4063

IN RE:

NORMA TURNER

ORDER DENYING MOTION TO DISMISS

THIS CAUSE came on to be heard before me on the Motion to Dismiss made by counsel for Respondent, prior to trial on June 8, 1979, on the grounds that F.S. § 410.104 (Supp. 1978), the statute under which the Petition in the instant action is brought, is unconstitutional on its face and as applied, and further that the statute is inapplicable to Respondent in that it applies only to situations where a caretaker is abusing or neglecting an elderly person suffering from the infirmaties of aging, and after having heard the argument of counsel, it is thereupon,

ORDERED and ADJUDGED:

1. That this Court is specifically passing upon and upholding the constitutionality of F.S. § 410.104 (Supp. 1978).

2. That F.S. § 410.104 (Supp. 1978) does not violate substantive and procedual due process and the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article 1, Section 2 and 9 of the Florida Constitution.

3. That F.S. § 410.104 (Supp. 1978) is not vague and indefinite so as to be violative of due process as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article 1, Section 9 of the Florida Constitution.

4. That F.S. § 410.104 (Supp. 1978) does not violate Respondent's right to counsel guaranteed by the Sixth Amendment to the United States Constitution made applicable to the State by the Fourteenth Amendment.

5. That F.S. § 410.104 (Supp. 1978) does apply to Respondent in this cause and is not limited to situations where a caretaker is abusing or neglecting an elderly person suffering

from the infirmaties of aging, but rather, applies as well where such an elderly person is alleged to be neglectful and unable of caring for himself.

DONE and ORDERED in Chambers at Miami, Dade County, Florida, this 13 day of January, 1979.

CIRCUIT COURT JUDGE

Copies furnished to:

Lester C. Wisotsky, Esq.
Barry A. Weinstein, Esq.
Leonard Helfand, Esq.
Janet Reno, State Attorney
Jim Smith, Attorney General

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA.

PROBATE DIVISION - MENTAL HEALTH

CASE NO. 79-4063

IN RE:

NORMA TURNER

CORRECTED ORDER DENYING MOTION TO DISMISS

THIS CAUSE came on to be heard before me on the Motion to Dismiss made by counsel for Respondent, prior to trial on June 8, 1979, on the grounds that F.S. § 410.104 (Supp. 1978), the statute under which the Petition in the instant action is brought, is unconstitutional on its face and as applied, and further that the statute is inapplicable to Respondent in that it applies only to situations where a caretaker is abusing or neglecting an elderly person suffering from the infirmaties of aging, and after having heard the argument of counsel, it is thereupon,

ORDERED and ADJUDGED:

1. That this Court is specifically passing upon and upholding the constitutionality of F.S. § 410.104 (Supp. 1978).

2. That F.S. § 410.104 (Supp. 1978) does not violate substantive and procedual due process and the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article I, Section 2 and 9 of the Florida Constitution.

3. That F.S. § 410.104 (Supp. 1978) is not vague and indefinite so as to be violative of due process as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article I, Section 9 of the Florida Constitution.

4. That F.S. § 410.104 (Supp. 1978) does not violate Respondent's right to counsel guaranteed by the Sixth Amendment to the United States Constitution made applicable to the State by the Fourteenth Amendment.

5. That F.S. § 410.104 (Supp. 1978) does not violate Respondent's right to privacy guaranteed by the United States Constitution and the Florida Constitution.

6. That F.S. § 410.104 (Supp. 1978) does apply to Respondent in this cause and is not limited to situations where a caretaker is abusing or neglecting an elderly person suffering from the infirmaties of aging, but rather, applies as well where such an elderly person is alleged to be neglectful and unable of caring for himself.

DONE and ORDERED in Chambers at Miami, Dade County, Florida, this 13 day of June, 1979.

CIRCUIT COURT JUDGE

Copies furnished to:

Lester C. Wisotsky, Esq.
Barry A. Weinstein, Esq.
Leonard Helfand, Esq.
Janet Reno, State Attorney
Jim Smith, Attorney General

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA.

PROBATE DIVISION - MENTAL HEALTH

CASE NO. 79-4063 - [illegible]

IN RE:

NORMA TURNER

FINAL JUDGMENT OF ACQUITTAL - ORDER OF DISCHARGE

THIS CAUSE came on to be heard before me on June 8, 1979, on a Petition filed by the Department of Health and Rehabilitative Services of the State of Florida, under F.S. § 410.104 (Supp. 1978) to determine whether there is probable cause of the infirmity of aging being suffered by Respondent, to Order her temporary placement for up to four days, and after having heard the testimony of the witnesses and the argument of counsle, it is thereupon,

ORDERED and ADJUDGED:

1. That the State of Florida has failed to present sufficient evidence to meet its burden of proof to establish that there is probable cuase to believe that the Respondent is suffering from the infirmity of aging.

2. That therefore it is the decision of this Court that the Petition be dismissed and a Final Judgment of Acquittal be and the same is hereby entered in this cause.

3. That upon the conclusion of this hearing that the Respondent shall be released and discharged forthwith from Jackson Memorial Hospital where she is being held pursuant to the emergency ex-parte Order entered in this cause on June 6, 1979.

DONE and ORDERED in Chambers at Miami, Dade County, Florida, this 12 day of June, 1979.

[illegible]
CIRCUIT COURT JUDGE

Copies furnished to:

Lester C. Wisotsky, Esq.
Barry A. Weinstein, Esq.
Leonard Helfand, Esq.
Janet Reno, State Attorney
Jim Smith, Attorney General

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA.

PROBATE DIVISION - MENTAL HEALTH

CASE NO. 79-4064

IN RE:

NORMA TURNER

: NOTICE TO PROCEED ON APPEAL AS INDIGENT

Respondent, NORMA TURNER, by and through her undersigned counsel, pursuant to Rule 9.430 of the Appellate Rules, moves this Court to enter an Order permitting Respondent to proceed as an indigent without payment of fees to review the Final Judgment of Acquittal in this cause dated June ____, 1979, and as grounds therefor states:

1. That Respondent is indigent, poverty-stricken, and unable to pay the fees, costs, and charges, otherwise payable by law to any of the officers of the court system.

2. That pursuant to F.S. § 57.081, the Respondent herewith files her Insolvency Affidavit and Attorney's Certificate (copies of which are attached hereto).

3. Counsel for Respondent has conferred with counsel for the Department of Health and Rehabilitative Services of the State of Florida, and he has no opposition or objection to this Motion.

WHEREFORE, Respondent prays that this Court enter an Order permitting her to proceed on appeal of the Final Judgment in the instant action as an indigent and without payment of the fees otherwise prescribed by law.

Respectfully submitted,

LEGAL SERVICES OF GREATER MIAMI, INC.

By: _____
LESTER C. WISOTSKY
Attorney for Respondent
Post Office Box 47008
Miami, Florida 33147
Telephone: (305) 638-6800

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Proceed on Appeal as Indigent was mailed to Lenny Helfand, Esquire, Department of HRS, District XI, 401 N.W. 2nd Avenue, Miami, Florida 33128, Janet Reno, State Attorney, Office of the State Attorney, 1351 N.W. 12th Street, Miami, Florida 33125, and Jim Smith, Attorney General, Office of the Attorney, 408 N.W. 2nd Avenue, 6th Floor, Miami, Florid. 33128, this 15 day of June, 1979.

LESTER C. WISOTSKY

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA.

PROBATE DIVISION - MENTAL HEALTH

CASE NO. 79-4063

IN RE:

NORMA TURNER

INSOLVENCY AFFIDAVIT

STATE OF FLORIDA)
) SS.:
COUNTY OF DADE)

BEFORE ME, the undersigned authority, personally appeared NORMA TURNER, who, after being duly cautioned and sworn, deposes and says that she is applying under F.S. §57.081 for the benefits accorded in behalf of insolvent and poverty stricken persons; that she is insolvent and unable to pay the charges, costs, and fees otherwise payable by law to any of the offices of the Court.

FURTHER AFFIANT SAYETH NOT.

NORMA TURNER, Affiant

Sworn to and subscribed before me this 12 day of June, 1979.

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE. My Commission Expires: NOTARY PUBLIC STATE OF FLORIDA AT LARGE MY COMMISSION EXPIRES JUN 2 1982 BONDED THRU GENERAL INS. UNDERWRITERS

ATTORNEY'S CERTIFICATE

I am the attorney for the Respondent herein and licensed to practice law in Florida. I believe the truth of the matter contained in the Insolvency Affidavit filed herein. I have investigated the nature of the Respondent's claim and in my opinion it is meritorious as a matter of law. My client has neither paid me nor promised payment of any remuneration for my services and I do not intend to charge any fees for my services.

LEGAL SERVICES OF GREATER MIAMI, INC.

BY: _____
LESTER C. WISOTSKY
Attorney for Respondent
LAW CENTER NORTH
P. O. Box 47000N
Miami, Florida 33147
Telephone: 638-6666

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA.

PROBATE DIVISION - MENTAL HEALTH

CASE NO. 79-4063

IN RE:

NORMA TURNER : NOTICE OF APPEAL

Notice is hereby given that NORMA TURNER, Respondent, Appellant, appeals to the Supreme Court of the State of Florida, the Corrected Order Denying Motion to Dismiss rendered June 13, 1979, merged in the Final Judgment of Acquittal of the same date. The nature of the Corrected Order is a Final Order Denying Respondent's Motion to Dismiss and upholding the constitutionality of F.S. § 410.104 (Supp. 1978). Said Order is merged into the Final Judgment rendered in the case.

Since the Order "initially and directly passes on the validity of a State statute," namely F.S. § 410.104 (Supp. 1978), the Supreme Court has jurisdiction over this appeal by virtue of Article V, Section 3(b)(1) of the Florida Constitution and Appellate Rule 9.030(a)(1)(ii).

Respectfully submitted,

LEGAL SERVICES OF GREATER MIAMI, INC.

- FILED -
RICHARD P. BRINKER
JUL 6
CLERK CIRCUIT COURT
DADE COUNTY

RECEIVED
JUL 12 1979
RICHARD P. BRINKER
CLERK

By: _____
LESTER C. WISOTSKY
Attorney for Respondent
Post Office Box 47000
Miami, Florida 33147
Telephone: (305) 638-6666

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to LENNY HELFAND, Esquire, Department of HRS, District XI, 401 N.W. 2nd Avenue, Miami, Florida 33128, JANET RENO, State Attorney, Office of the State Attorney, 1351 N.W. 12th Street, Miami, Florida 33125, and JIM SMITH, Attorney General, Office of the Attorney General, 408 N.W. 2nd Avenue, 8th Floor, Miami, Florida 33128, this 12 day of July, 1979.

OR 10441 - 856

LESTER C. WISOTSKY

- FILED -
RICHARD P. BRINKER
CLERK
JUL 20 1979
CIR. & CO. COURT
DADE COUNTY

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

PROBATE DIVISION - MENTAL HEALTH

CASE NO. 79-4063

IN RE:

NORMA TURNER

ORDER PERMITTING RESPONDENT TO PROCEED ON APPEAL AS INDIGENT

THIS CAUSE came on to be heard before me upon the Motion of Respondent, NORMA TURNER, for entry of an Order, pursuant to Rule 9.430 of the Appellate Rules, permitting her to proceed on appeal of the Final Judgment of Acquittal in the instant action dated June 13, 1979, as indigent without payment of the fees otherwise prescribed by law, and the Respondent having filed her Insolvency Affidavit and Attorney's Certificate pursuant to F.S. 57.081, and the Court being fully advised in the premises, it is thereupon,

ORDERED and ADJUDGED:

1. That Respondent, NORMA TURNER, is indigent and unable to pay the fees on appeals as prescribed by law.

2. That Respondent, NORMA TURNER, is entitled to proceed on appeal of the Final Judgment of Acquittal entered in the instant action pursuant to Rule 9.430 of the Appellate Rules, as indigent and without payment of the fees otherwise prescribed by law; and the appeal shall so proceed.

3. That however, there is no need for a transcript of the hearing held on June 8, 1979, until the Appellate Court determines whether there is standing to bring the appeal, and the state shall not pay for the transcription of said hearing until the Appellate Court determines that it will hear the appeal on its merits and a transcription of the hearing is to be part of the record on appeal for

FIL 1044 :: 836

a determination of the constitutionality of the statute under attack herein (F.S. §410.104, Supp. 1978).

DONE and ORDERED in Chambers at Miami, Dade County, Florida, this 7 day of Dec., 1979.

CIRCUIT COURT JUDGE

Copies furnished to

Lester C. Wisotsky, Esq.
Barry A. Weinstein, Esq.
Janet Reno, State Attorney
Jim Smith, Attorney General
Lenny Helfand, Esq.

79-10441 : 851

STATE OF FLORIDA)
)
COUNTY OF DADE)

I, RICHARD P. BRINKER, Clerk, Circuit and County Courts, in and for Dade County, Florida, DO HEREBY CERTIFY that the foregoing pages 1 to 36 inclusive, consolidated contain a correct copy of the judgment in the case of In Re: The Matter of ETHEL EVENE; In Re: The Matter of EGNIA TURNER, Probate Division Case Nos. 79-4062 and 79-4063 and a true and correct recital and inclusion of such transcript of ~~xxxxx~~ papers and proceedings in said cause as appear from the records and files of my office that have been directed to be included in said record.

(Volume II , comprising pages 1 to 56 inclusive, contains the transcribed notes of the reporter as made at the trials and certified to me by her and bound under separate cover)

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Court this 27th day of August A.D. 19 79

RICHARD P. BRINKER
Clerk, Circuit and County Courts
in and for Dade County, Florida

By _____
Deputy Clerk

CIVIL Cir. Ct. 321 Rev. 6/78

81-5827

RECEIVED
DEC 7 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

PROBATE DIVISION

In Re: The Matter of :
:
HERBERT BYRNE. : NO. 79-4062
:

:
In Re: The Matter of :
:
NORMA TURNER. : NO. 79-4063
:

The above-styled matters came on for hearing before the Honorable Francis J. Christie, Circuit Court Judge, in Chambers at the Dade County Courthouse, Miami, Florida, on Friday, June 8, 1979, commencing at 10:[illegible] A.M., pursuant to Notice.

- - -

APPEARANCES:

LEONARD HELFAND,
District Counsel,
Department of Health & Rehabilitative Services,
Miami, Florida,
on behalf of the Petitioner.

BENNETT H. BRUMMER,
Public Defender,
By: BARRY A. WEINSTEIN,
Assistant Public Defender,
on behalf of the Respondent,
-and-
LESTER WISOTSKY,
Staff Attorney,
Legal Services of Greater Miami, Inc.,
Miami, Florida,
on behalf of the Respondent.

ALSO PRESENT:

LUCILLE CREVALLE
OSWALDO SIERRA

- - -

[Thereupon, the following proceedings were had:]

THE COURT: What is this on?

MS. CREVALLE: On an ex parte order for emergency custody and transport pursuant to Chapter 77-366, Florida Statute 409.3635, on both Herbert Michael Byrne and Norma B. Turner.

THE COURT: What are the allegations as to these two people?

MS. CREVALLE: As I stated here, when I visited Mr. Byrne on 6-5-79, I found him naked and surrounded by human excrement. There was an absence---

THE COURT: What are you seeking?

MS. CREVALLE: I am seeking an extension of the time for them to be kept in the hospital in order to try and get them services or get their home cleaned up or livable or, if found necessary, a guardian to help supervise this because as they are living, they are not capable of continuing to live as they are.

THE COURT: I see.

What is your position?

MR. WEINSTEIN: If I may, Your Honor, Barry Weinstein, Assistant Public Defender for the record.

If I may just give you a bit of chronology to put this in the proper prospective: On June 5, 1979, an emergency ex parte order under 394.463 was signed by Your Honor

temporarily putting these individuals into Jackson Memorial Hospital. It was under the Baker Act emergency provisions.

Thereafter, on June 6th of 1979, HRS came before this Court to seek an ex parte order pursuant to 410.104, the Adult Protective Services Act which was issued on both Norma Turner and Mr. Byrne.

At this point in time we are here for a preliminary hearing to determine probable cause in connection with their detainment.

Our contentions are that these individuals are, first, legally competent adults and they want to return to their home and they are being confined at Jackson Memorial Hospital in the emergency room against their wishes.

THE COURT: That is not under the Baker Act but under this act?

MR. WEINSTEIN: Yes, sir.

The Baker Act is now inapplicable in that the receiving facility, Jackson Memorial Hospital, did not pursue it within the 48-hour period to press for involuntary hospitalization.

So HRS is moving under 410.104.

THE COURT: Fine.

Your statement would go as to both parties; is that correct, ma'am?

MS. CREVALLE: If I understand all that he said,

yes.

THE COURT: His statement, of course, would go to both?

MR. WEINSTEIN: Norma B. Turner, also, yes, sir.

MR. WISOTSKY: Your Honor, before you call the witnesses, there are pre-hearing motions to dismiss which we would like to argue based on constitutional and statutory grounds.

MR. WEINSTEIN: I will serve this on the representative of HRS.

THE COURT: Do you have anyone here from the State Attorney's office?

MS. CREVALLE: No, I do not. I only have a gentleman who I would like to come in who knows more than I do about this.

THE COURT: What is his name?

MS. CREVALLE: Mr. Oswaldo Sierra.

MR. WEINSTEIN: I will serve the HRS representative or HRS legal counsel here.

THE COURT: Send in Mr. Sierra, please.

Do you generally in these cases have any prosecutor to aid and assist? Do you not do that? Generally, these cases are not contested, we realize that.

MS. CREVALLE: Right. I believe Mr. Sierra has been in to court on one when someone did come. Although he

has been in court to assist, Mr. Helfand has not been in with him.

Mr. Helfand would have been here but he is in federal court.

THE COURT: Well, he represents---

MS. CREVALLE: Mrs, right. But he is in federal court today.

THE COURT: What is he doing in federal court today?

MS. CREVALLE: I did not ask him. His secretary came here before and told me that he will not be here and here we are, so---

THE COURT: Well, do you have his phone number, ma'am?

MS. CREVALLE: Yes, I do.

No, I do not have it. I happen to have left it out of my notes.

MR. WEINSTEIN: I believe it is 377-5080, to my knowledge.

THE COURT: You are attacking what, the constitutionality of the statute?

MR. WEINSTEIN: Yes, sir.

MR. WISOTSKY: Yes.

MR. WEINSTEIN: And the applicability of the statute as well to this situation, yes.

THE COURT: Mr. Helfand certainly should be here

with an attack on the statute. These good people cannot proceed without him.

MS. CREVALLE: Was he aware of this?

THE COURT: I do not think he was aware.

MR. WEINSTEIN: He was not aware of this particular motion. He was aware of this hearing as I spoke with him.

THE COURT: He knew of the hearing but he did not know you were going to attack the constitutionality of the statute.

MR. WISOTSKY: Your Honor, part of the problem was that there was no formal notice procedure in this hearing.

One of the social workers at Jackson called us just this Wednesday. We went over there yesterday. So there was little time to prepare.

THE COURT: It was late when my office did get in touch with you.

MS. CREVALLE: Excuse me. I had notified Legal Aid the day I was there. That is where you got the original call, from Peggy Fish. I called because I know that they should have legal services.

MR. WEINSTEIN: You are right, but we were not actually appointed until Judge Christie appointed us yesterday.

THE COURT: That is correct. It was not until late yesterday afternoon. I know when they were appointed that it

Castillo & Castillo
Registered Professional Reporters
[illegible]

was after 2:00.

Well, this is a serious thing where you are attacking the constitutionality.

If it is unconstitutional, it is unconstitutional, but certainly the State is entitled, as you know, to be here.

MR. WEINSTEIN: Yes, sir.

THE COURT: Mr. Helfand is in federal court and they do not know when he will return.

MR. WEINSTEIN: I think they have a number of other attorneys at HRS.

THE COURT: Again, there is no criticism to you gentleman because I think you are acting very punctually as far as your position is concerned, but I feel Mr. Helfand should be here.

I would like to read, not in its entirety, but certain parts of the Motion to Dismiss:

"Motion to Dismiss, by Respondent, Herbert Byrne, by and through his undersigned counsel, moves the Court to dismiss the petition for emergency services pursuant to Florida Statute 410.104 on the following grounds"--this is their motion--"That the Florida Statute 410.104 is unconstitutional on its face and as applied since said statutes deprive respondent of his liberty in violation of due process and equal protection as guaranteed by the Fourteenth Amendment to the

United States Constitution and by Article 1, Sections 2 and 9 of the Florida Constitution."

Second, the "Florida Statute 410.104 is unconstitutional on its face and as applied since said statute denies respondent procedural and substantive due process rights as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article 1, Section 9 of the Florida Constitution."

And third, that "Statute 410.104 is unconstitutional on its face and as applied since said statute is vague and indefinite in violation of due process as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article 1, Section 9, of the Florida Constitution."

And four, the "Florida Statute 410.104 is unconstitutional on its face and as applied since said statute deprives respondent of the right to counsel as guaranteed by the Sixth Amendment to the United States Constitution.

"Wherefore, the respondent requests this court to enter an order dismissing said petition and discharging respondents from custody of the Department of Health & Rehabilitative Services and further declaring Florida Statute 410.104 unconstitutional on its face and as applied based on the foregoing grounds.

"Respectfully submitted, Barry A. Weinstein, Assistant Public Defender."

For the record, that motion is in respect to respondent Herbert Byrne and also identically to Norma Turner.

The Court is of the opinion that these are serious motions of the highest degree and, therefore, require the State to be represented at this time.

Off the record, please.

[Discussion off the record]

THE COURT: I am going to ask you good people to step outside.

[Thereupon, the above proceedings were concluded.]

- - -

CERTIFICATE

STATE OF FLORIDA)
: SS.
COUNTY OF DADE)

I, PAULA J. DUNDON, Registered Professional Reporter, hereby certify that the foregoing transcript, pages numbered from 1 to and including 10, is a true and correct transcription of my stenographic notes of the proceedings had and testimony taken in the matter of Herbert Byrne and Norma Turner, Nos. 79-4062 and 79-1063, before the Honorable Francis J. Christie, at the Dade County Courthouse, Miami, Florida, on the 8th day of June, 1979.

DATED at Miami, Dade County, Florida, this 23 day of June, 1979.

PAULA J. DUNDON, Court Reporter

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

PROBATE DIVISION

In Re: The Matter of HERBERT BYRNE.	:	NO. 79-4062
In Re: The Matter of NORMA TURNER.	:	NO. 79-4063

The above-styled matters came on for hearing before the Honorable Francis J. Christie, Circuit Court Judge, in Chambers at the Dade County Courthouse, Miami, Florida, on Friday, June 8, 1979, commencing at 3:00 p.m., pursuant to Notice.

- - -

Castillo & Castillo
Registered Professional Reporters
2100 S.W. 12th Avenue • Miami, Fla. 33129
Tel: 324-6311

APPEARANCES:

LEONARD HELFAND,
District Counsel,
Department of Health & Rehabilitative Services,
Miami, Florida,
on behalf of the Petitioner.

BENNETT H. BRUMMER,
Public Defender,
By: BARRY A. WEINSTEIN,
Assistant Public Defender,
on behalf of the Respondent,
-and-
LESTER WISOTSKY,
Staff Attorney,
Legal Services of Greater Miami, Inc.,
Miami, Florida,
on behalf of the Respondent.

ALSO PRESENT:

LUCILLE CREVALLE
OSWALDO SIERRA
DR. DOMINIC MAJIO
DR. MARK O'CONNELL
MR. ANTHONY WATTS

- - -

I N D E X

Witness	Direct	Cross
Lucille Crevalle	24	29
Anthony Watts	33	36

- - -

[Thereupon, the following proceedings were had:]

THE COURT: Gentlemen, are you ready?

MR. HELFAND: Yes, sir.

MR. WISOTSKY: Yes, sir.

THE COURT: All right. Would you state your name?

MR. HELFAND: Leonard Helfand, District Counsel, Department of Health & Rehabilitative Services, Miami.

THE COURT: And you, gentlemen?

MR. WEINSTEIN: Barry Weinstein, Assistant Public Defender, Dade County, Florida.

MR. WISOTSKY: Lester Wisotsky with the Legal Services of Greater Miami.

THE COURT: All right. Who is going to argue?

MR. WISOTSKY: I will.

We are moving to dismiss this action on the grounds that the statute under which the department is proceeding, Florida Statute 410.104 currently, that the Adult Protective Services Act is unconstitutional on its face and as applied.

The statute violates and denies both procedural and substantive due process and equal protection as well as guarantees under the Florida State Constitution and the Federal Constitution as well.

It denies procedural due process as it fails to provide even the minimum requirements contained in the

Baker Act, for instance: of a notice of hearing; the right to appear and be heard; and the right to be represented by counsel, a right guaranteed by the Sixth Amendment to the Federal Constitution.

It is infirm further for its vagueness. It sets forth standards not sufficiently clear to apprise an individual of ordinary intelligence what is deemed as being violated.

There are no standards under the government's discretion. There is no indication what kind of evidence is sufficient, who is to testify and where the individuals are to be placed.

The statute further violates the substantive due process. It authorizes the detention and deprivation of an individual's liberty--a person who has not been convicted of a crime, has not been adjudged incompetent nor even mentally ill--as contrary to most of the basic concepts of Anglo-Americ. jurisprudence, that a rational adult can be coerced and forced to undergo mental treatment against his will.

The parens patriae doctrine is insufficient to warrent a deprivation of liberty to a person who is under no legal disability to act for himself.

And we cite the Court's attention to In re: Beverly, found at 342 So.2d 481, Supreme Court of Florida. That case upheld the Baker Act but certainly indicates that

parens patriae is insufficient to incarcerate a person who is legally competent.

Additionally, the right to privacy guaranteed by the Florida and Federal Constituions is being violated.

Mr. Justice Brandeis stated that the right to be left alone is the most precious of all of our rights in the case of Satz versus Perlmutter, 362 So.2d 160. The Court there held that under the right of privacy and expression of the sanctity of an individual's free choice and right to self-determination that a competent adult patient had the right to terminate an artificial life-sustaining device.

The Court stated, "We find and agree with several cases upholding the right of a competent adult patient to refuse treatment for himself."

Certainly in this case our clients are competent and can refuse assistance from the State.

The scheme likewise violates the equal protection clause. It discriminates against aged persons in that they are separated out from every other person, who is similarly situated, without a rational basis and subjected to legal proceedings that apply only to them.

It denies even the minimal rights to those committed under the Baker Act.

Lastly, I would say there is a statutory basis for our Motion to Dismiss and that is on the grounds that the

schemes they are using, the statute was not meant by the legislature to apply to the situation at hand.

The legislation, if you look at it carefully and look the Act over carefully, was meant to provide a remedy to protect elderly persons from abusive and neglectful caretakers, not from themselves.

There is a structure of the language used in the various sections of the statute which is indicative of this purpose.

Section 410.102,subsection 7, which defines neglect, defines it as meaning, "To omit, forbear or fail to exercise a degree of care and caution that a prudent person would deem essential to insure the well-being of an individual suffering from the infirmities of aging, and by such omission forbearance or failure, significantly impair or jeopardize the physical or emotional health of the individual suffering from the infirmities of aging."

Section 410.104 states a report shall be made as provided in Section 827.09. 827.09, subsection 2, states, "The purpose of this section is to provide for the detection and correction of the abuse or maltreatment of. . . persons whose health and welfare are adversely affected. . . by the abusive conduct of others."

Lastly, we cite the Court's attention to Section 410.101 of the Act. It is the section on legislative intent.

It concludes with the language that, "Nor shall anything in this Act be construed to authorize, permit, or require any medical care or treatment in contravention of the stated or implied objection of such person."

That such person is our client and he objects to the treatment and care here.

The State is simply unauthorized to provide it under that section.

THE COURT: All right, sir.

MR. HELFAND: The one major fallacy that I find in his argument is when we talk about forcing medical care, and as pointed out the statute does not force medical care, a person cannot be forced to accept medical care. And that has nothing to do with the statute.

The statute is only to put them on an emergency basis in a more protective environment. As a matter of fact, the first case that I have had, which I think we have only had four or five cases in the several years since the statute has been enacted, the people were taken out to Jackson. They did not accept medical treatment and they died. But they could not be forced to take any medication. They were just, you know, taken out of the situation and put in a more protective situation.

The due process, which cited the Baker Act, as analogous, is exactly the same, similar here as under the

Baker Act. There has to be a hearing within a short period of time. There is a provision for an ex parte order under the Baker Act to take someone to be evaluated just as there is 48 hours allowed here in a dire emergency situation.

But after--and it is the same thing as we have with other emergency situations such as under the Juvenile Act or where somebody can be taken in custody and given a hearing within a certain period of time; and, it is the same thing as a criminal defendant who can be taken in custody so long as he is given a hearing within a certain period of time--that does not violate due process if the hearing occurred almost immediately, which it would here as in these other situations.

As far as the right to counsel, it does not have to be specified in the Act. I would agree that people should be provided counsel and this could be adjudicated, hopefully, before we resolve it finally and we would have an opportunity to submit a memorandum of law as to the constitutionality of this statute.

It has not been addressed by any court previously, but certainly the court could rule that there is a right to counsel, which I would tend to lean to that opinion. This would not necessarily make the statute invalid because the right is not specifically provided for in the statute.

I think there is a great protection in this

particular statute for one thing, which makes it very specific and not vague.

And I think one of the very good protections is that both the police officer and the social worker must concur before any action can be taken under this statute.

Here we have two completely and, in a way, diverse disciplines and yet the police cannot say that someone's life is endangered from their point of view and the social worker can't say it. They must agree that the person's life is endangered in order to take action under this statute.

As far as the interpretation of the statute itself, I think abuse would cover both situations. It could cover a situation where someone is subject to abuse by another party but yet we know that elderly people can get in a self-abuse situation and the statute does not limit itself to the abuse of others.

If there is abuse where a report would be inappropriate, a report can be made under 827.09. The report could still be made even in a self-abusive situation because one of the purposes of the report is to bring to the attention of the agency these situations for the benefit of the agency as well as the police.

Not all abuse situations necessarily have to be reported to the police and self-abuse could be one of these

situations that is non-criminal.

So I would just say in summary that I think there are standards. I think there is protection in the statute and, in particular, there is provision for a hearing which I think would eliminate any possible constitutional infirmity.

Again, there is a question of first impression in Florida on the statute. I think, if we are going to get into that phase in any more detail, there should be a briefing. Many other similar statutes have been upheld and, of course, we have not had an opportunity at this point to dig out all the cases on that matter.

THE COURT: Gentlemen?

MR. WISOTSKY: But, Your Honor, fundamental to the concept---

THE COURT: What do you conclude to be the difference or the differential between this act and the Baker Act which permits the same thing, a hearing within 48 hours thereafter?

MR. WISOTSKY: One of the primary things is notice. Certainly one of the primary concepts of due process is notice. Our clients did not receive any notice of this hearing. There is no requirement in the statute as there is in the Baker Act for notice of the hearing.

And notice in the Baker Act includes the right to counsel, the right to appear and be heard. It informs the

person of the nature and grounds for which he is being held. None of these things are apparent in the statute before you.

THE COURT: Anything further?

MR. WEINSTEIN: If I may, Your Honor.

Also a very important differentiation between this particular statute and the Baker Act is the Baker Act states in fact that the testimony must be presented by expert witnesses, that being a physician as licensed under the State of Florida. There are procedural problems there in connection with presenting the evidence on mental illness.

Mr. Helfand did allude to the possibility of correlating this particular statute with the statute dealing with children.

As we know, children are dependents and they are not considered legally competent under the laws of Florida. In connection with this particular statute and these particular individuals, particularly, they are legally competent under Chapter 744, they have not been declared incompetent under Chapter 744. They have not been declared mentally ill under Chapter 294.

As stated previously, they have not gained any notice in connection with this particular hearing. They were not put on notice of the standards to commit them for the initial period of time or subsequent if, in fact, the Court finds they should be continued for a period of time.

Also very vague in connection with this statute is what occurs after the preliminary hearing to determine probable cause.

The statute under 410.104 refers to, if I may it is Section 4 of 410.104, and it states, "Upon a finding of probable cause, the Court may order temporary placement for up to four days, pending the hearing for a need for continuing services."

It does not lay out any criteria, any standards, it does not state with any specificity exactly what the continuing services are to be.

So there is a major difference between Chapter 394, Chapter 39, as Mr. Helfand alluded to, and Chapter 410.

Chapter 394, which was upheld in in re: Beverly, specified the procedural due process elements and, also, substantiated the criteria needed to commit somebody to an institution, that the individual was mentally ill and because of the mental illness, he is likely to injure himself or others or he's unable to care for himself and make application on his own behalf.

This is presented by testimony from physicians that have applied to the Court and specified with specificity exactly what their diagnosis is, giving the patient the opportunity to understand exactly what the standards are for commitment or detention or placement, whatever word you

exactly want to use.

So that is the major difference between these three statutes that can actually commit somebody.

Also we can look under 396 under the Myers Act and 393 under the Retardation & Prevention Control Act which incorporates due process with retardation and with those individuals who are alleged to be alcoholic.

And they also have due process rights which are substantial to 394, laid out with specificity.

THE COURT: Under the Baker Act, there must be a finding at the time of the hearing that the person is a danger to himself or to others.

Now, that is not necessary in this. And you would admit that; is that correct?

MR. WEINSTEIN: Correct.

What I do state, which is necessary for the fact, is that there is evidence presented that there is a substantial risk of life-threatening physical harm or deterioration if, in fact, that is considered a criteria.

THE COURT: Would you not consider that that is the legislative intent of this particular Act as to aid and assist the aged person, the ailing person, and to give to him, as they put it in here, life-saving treatment and medication?

There is no necessity, as I read this Act, that the person be of danger to anyone. In other words, they are not

generally not of danger to anyone else. If they were, obviously, they would come under the Baker Act.

Now, under the Baker Act that is a conditioned precedent, you must show that there is a danger to himself or other people before you can continue confinement of the respondent, of course, for purposes of aid and treatment for mental illness.

But in this case the criteria, as I see it, of the statutory enactment is to aid and assist an aged person who is not a danger to society but because of his condition is a danger to himself when that is determined.

In other words, what I am saying is that the whole thing, as I see it here and I am not ruling, is you use the term, or your associate did, of parens patriae. It is a demonstration of parens patriae in its fullest sense, not for purposes of punishment, not for purposes of confinement, but for purposes of aid and assistance to a fallen human being.

MR. WEINSTEIN: If I may, Your Honor.

THE COURT: Yes, sir.

MR. WEINSTEIN: Respectfully, in actualities and to a certain extent, it seems like this lessens the impact of the Baker Act in detaining somebody against their will.

Again, we are talking about individuals that are legally competent under the law. If I just may briefly cite

to you a phrase in O'Connor versus Donaldson, cited as 95 Supreme Court 2586 (1975), it states there: "May the State confine the mentally ill merely to insure them a living standard superior to that they enjoy in the private community? That the State has a proper interest in providing care and assistance to the unfortunate goes without saying. But the mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution."

In a situation like this, you have an individual who is alleged to have infirmities of aging, which is observed by a social worker or a representative of the Department of HRS and a law enforcement officer. And without any other type of medical testimony outside of the pure observations of a representative of HRS and a law enforcement officer, and based upon their observations, they can actually remove somebody from the confines of their own home and place them---

THE COURT: With an order of the court.

MR. WEINSTEIN: By the order of the court, Sir, yes.

And they can prevent them from leaving their home and put them in a facility or in protective placement against their will because they feel, through their observations, that these individuals maybe have a substantial--I will use the word substantial--risk of life-threatening physical harm or

deterioration.

But there are no standards or criteria to enunciate exactly what does it mean to have a substantial risk of life-threatening physical harm or deterioration.

It is important to know the definition under the infirmity of aging which is under 410.102 and it states, "'Infirmities of aging' means organic brain damage, advanced age or other physical,mental or emotional dysfunctioning in connection therewith, to the extent that the person is substantially impaired in his ability adequately to provide for his own care or protection."

Now, obviously, it would seem, assuming to our argument that there are standards, that that would have to be met, that the individuals are substantially impaired.

But again that is a vague concept and does not tell the individual what prescribed conduct that he must violate in order to fit within the confines of being under the auspices of the statute.

The normal average individual who would come into contact with the Adult Protective Services Act, because of the vagueness and indefiniteness of the Act itself, again, it does not lay out within a degree of specificity the criteria or the standards or guidelines in detaining somebody against their wishes in protective custody.

If I may allude just briefly to in re: Beverly.

In that particular case, Your Honor, the Supreme Court upheld the constitutionality of the Baker Act.

In dealing with the Pennsylvania statute they state in essence that the individual could be involuntarily committed if he were mentally ill and needed care and treatment. The court did not uphold the constitutionality of that statute because it was vague, because it did not define with specificity what is mental illness and what is in need of care and treatment.

Therefore, it left to the discretion of governmental authorities, like HRS, the discretion of actually detaining somebody against their will, if, in fact, they were deemed legally competent.

Again, we haveto kind of differentiate between the Baker Act on the one hand and the Adult Protective Services Act.

It is also interesting to note the language in in re: Beverly which stated, "Analysis of the sources of the civil commitment power likewise lends no support to that motion. There can be little doubt in the exercise of its police power a state may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease.

"Additionally, the states are vested with the historic parens patriae power, including the duty to protect

persons under legal disabilities to act for themselves."

I emphasize ". . .under legal disabilities to act for themselves.

"The classic example of this role is when a state undertakes to act as the general guardian of all infants, idiots and lunatics."

I state in essence that this is not the situation. These individuals are not under legal disability. They are competent adults under the eyes of the State of Florida and they have a right to not be deprived of any liberty for however the length of time in connection with any compelling state interests by the State of Florida.

MR. HELFAND: At the point that someone files a Baker Act petition, they are also presumed to be legally competent at that point. But I think we are talking about in definite or longer term confinement under the Baker Act. And here we are talking about a maximum of emergency confinement for four days.

I think their argument overlooks that.

Secondly, it is not the Baker Act itself that is any more specific than this act. It has been refined by court decisions that the Act itself, I would say, the Baker Act is possibly more vague because here we have two criteria--one, that they be impaired and suffering from the infirmities of old age; and then secondly on top of that, that they are

in a substantial risk of life-threatening situation.

In the Baker Act, where they have to be a danger to themselves or others, that also could be determined vague. It has only been by the Beverly and other decisions that we have read some specificity into the Baker Act. But, again, there we are talking about a longer term confinement. Here we are only talking about a maximum of being removed to a protective environment for several days.

MR. WISOTSKY: That simply is not true. That statute authorizes, upon final hearing, permanent involuntary commitment. Subsection 4 says upon the finding of probable cause, the Court may order temporary placement for up to four days, which is the real question before the Court.

Pending the hearing, which is a final hearing for a need for continuing services, that continuing services could be permanent commitment.

MR. HELFAND: I disagree. I think after that point it is strictly not a question of any involuntary confinement but the only thing that it may refer to is possibly ordering the State to provide certain services to the person.

I think that is erroneous, that there is any question of a longer term. It is strictly an emergency statute.

MR. WEINSTEIN: If I may draw an analogy to an individual who may have a heart disease or a broken leg or

cancer. If he is legally competent, you cannot force that individual to undergo treatment. You cannot put that individual in protective custody for the benefit of the State of Florida or for the benefit of the State in general.

In this connection, the only situation that this deals with is some individual who is allegedly infirm and substantially impaired of his ability not to be able to take care of himself.

But we are talking about a situation where you cannot force somebody who has, again, a broken leg or a heart condition for treatment. And I do draw the analogy between treatment and protective services because by putting somebody as these two individuals in an emergency setting as at Jackson, and though they are not being treated by the pure sense, they are there.

And it is the placement itself that is tantamount to treatment because it is an indication of treatment that they belong in some protective custody.

So then they should be or belong in their own home under their own guidance and structure and their own environment as they want to live.

MR. HELFAND: I do not think the place of placement, that would not be an argument because that, you know, the statute would just specify what is appropriate. If Jackson is not appropriate, that would be a defense to the action.

It would not go to the constitutionality.

THE COURT: Anything further, gentlemen?

MR. WEINSTEIN: With respect to the standards and vagueness, the problem is that it is so vague it leaves no room for any real complete understanding that when you actually read it, there is a misunderstanding of exactly the interpretation of the statute, the standards of the statute.

And no person should be deprived, especially of his liberty, unless the statute under which he will be detained--we will call it that or put in protective custody--is so clear that it leaves no room for doubt about what it means.

I contend, therefore, that the statute in connection with this is void because of the vagueness, notwithstanding the other legal arguments that we have presented, because it is vague in connection with the interpretation and understanding.

And it is a mechanism to avoid utilizing a statute such as the Baker Act because one must take into understanding, especially within this particular case, that these individuals were initially Baker Acts.

Excuse me, they were placed under emergency care pursuant to 394.463, Subsection 2. That law enforcement officer brought them over to Jackson. Subsequently, they relied on this particular statute, 410.104, to keep them at Jackson Memorial Hospital.

I imagine in the eyes of the individuals at Jackson, they did not determine these individuals needed to meet the criteria in the Baker Act.

It seems like this standard is less and it can actually confine somebody for a period of time.

And Mr. Helfand states that it is only temporary but it is a period of time where somebody is away from their own comforts of their own home, based upon representations made by the Department of HRS and a law enforcement officer, against the will of the legally competent individuals that have not been determined to be under any legal disability.

THE COURT: Anything further?

MR. HELFAND: I think it took my reading the Baker Act about six or seven times until it made any sense at all.

I think he is saying that with the complexity of the statute that they both have to be read carefully but that does not mean that they are vague or not specific.

THE COURT: Gentlemen, the motions to dismiss in each of the cases are denied.

It is the Court's feeling that the statute under which the motions are or upon which the motions have been predicated, that the statute is, in my opinion, constitutional.

Off the record for a moment, please.

[Discussion off the record]

MR. WEINSTEIN: For the record, to my left is Dr. Dominic Majio. He is the senior resident in the emergency room at Jackson Memorial Hospital. He is a licensed physician under the State of Florida.

On his left is Dr. Mark O'Connell. He is an intern under the auspices of Jackson, practicing in Jackson under the supervision of the senior resident at Jackson Memorial Hospital.

THE COURT: Fine.

If you gentlemen will raise your right hands, please, and be sworn.

[Thereupon, the referred-to witnesses were sworn.]

THE COURT: Now, the burden, of course, is upon the prosecutor here to meet the criteria for further treatment.

Go ahead, sir.

MR. HELFAND: Well, then, I would like to call Mrs. Lucille Crevalle.

THE COURT: Fine.

Have you been sworn, Ma'am?

MS. CREVALLE: No, sir.

[Thereupon, the witness was duly sworn.]

Thereupon:

LUCILLE CREVALLE

was called as a witness by the Petitioner and,having been previously duly sworn, was examined and testified upon her oath as follows:

DIRECT EXAMINATION

BY MR. BELFAND:

Q What is your name and position?

A My name is Lucille Crevalle. I am a social worker for HRS, for aging and adult services.

Q What are your general responsibilities?

A I service the elderly and aged and disabled in the West Dade area of Dade County.

Q Have you had occasion to have contact with Norma Turner and Herbert Michael Byrne?

A Yes, I did.

Q When did you first have occasion to meet them?

A My first home visit to the Turners was on 6-4-79. But they were known to our agency prior to that. They have been known to our agency since about 1974.

Q What was your occasion for visiting them on that date, which you say was 6-4, your first visit?

A We had received a call from Mrs. Oelver, the social worker at JNH. And she had stated to us that Mr. Byrne had been in the hospital.

THE COURT: Do not tell us about that. As a result of that conversation, did you do something?

THE WITNESS: Yes, made a home visit that day. That day I did nothing. I went back to discuss it.

Q [By Mr.Helfand] What did you find that day?

A That day I found Mrs. Turner sitting in the front room nude. Mr. Byrne did not come out. He was in the bedroom because he said he had no clothes on.

They had a neighbor there that day. He was trying to help.

I found what appeared to be human excrement, liquid, solid waste in the front room, debris all over.

Mrs. Turner was lying on either a bed or sofa there. Her feet, her hands were covered with what appeared to be excrement.

There was grass covering the house. I don't know if it was grass at that point. There were mounds of dirt.

There were fluids of all sorts over the floor. The stench was unbearable.

THE COURT: All right. Give her a question.

Q [By Mr. Helfand] Did you have occasion to come back?

A Yes, the following day.

Q And what happened?

A I went back because the police had called that a

worker should be sent out to that address. That is why I went back out.

Q Did you find them in any danger at that point at that time?

A Yes, I did.

I found at that time--- I was with a police officer officer Rupp [phonetic], and then his sergeant came out there

Q Tell us what you found, ma'am, not who came out.

A I found the same thing as I found the day before. Only this time Mr. Byrne was sitting there with Mrs. Turner, both were in the same condition.

Q In what danger were they at that time which was of a life-threatening situation?

A Mrs. Turner had fallen on the floor. Mr. Byrne was not able to pick her up. And that is why he called for help. She was lying there in the debris.

She was on the floor and he was not able to pick her up.

Q Were there any dangerous conditions in the house?

A Well, there is the ceiling that had fallen throughout parts of the house. The bathroom facilities aren't working. There are dangling wires throughout the house--- I don't know if that's, you know--with electricity.

Q What would be your plan or recommendation at this point for them?

THE COURT: What would you do?

THE WITNESS: What would I do?

THE COURT: As a result of this condition that you found.

THE WITNESS: The police went ahead and used the Baker Act at that time to take them in to Jackson Memorial, Crisis Intervention.

I then proceeded with my supervisor's discussion, then I went ahead and took out ex parte papers the following day. And they were then served at the hospital with those papers.

The police went ahead and called Minimum Housing, the gentleman is here, for him to come out and see the house.

I called United Home Care and received Mrs. Turner's permission to go ahead and clean up her house.

THE COURT: Give her a question, please, Sir.

Q [By Mr. Helfand] What is your recommendation at this point?

A I would like for the house to be cleaned up and, hopefully, to get some community services in there if the clients will accept them--they have not accepted them in the past--to try to help them stay in their home in a more livable, sanitary, humane condition.

Q Why can they not go back at this time and then have the services arranged?

A United Home Care is out there now with shovels, rakes, trying to take out the human waste, et cetera, from the house. They said that it will take them two to three days to clean it up.

Minimum Housing has served them with a violation on the house.

MR. WEINSTEIN: Your Honor, could she please be more responsive to Mr. Helfand's question?

THE COURT: Assume these facts, that the house was in clean and orderly condition and in a sanitary condition, could these people go back?

THE WITNESS: With assistance, I think. I don't think they can do it by themselves.

THE COURT: Do what?

THE WITNESS: To live there and take care of themselves. I think with possibly a homemaker, if we can get one from United Home Care, someone to give a little help there in the house.

THE COURT: Anything further, Mr. Helfand?

MR. HELFAND: I have nothing.

CROSS-EXAMINATION

BY MR. WEINSTEIN:

Q Ma'am, do you have any basic medical training at all?

A Do I have any---

MR. HELFAND: I object to the question.

I think the Act is not so much concerned with medical as it is with what the situation someone is in factually.

THE COURT: I do not think she has to be a doctor because we do not have to have a doctor as one of the three members of the committee. That has to do with the incompetency.

As a lay person, however, I think it just goes to the weight of her testimony and not the admissibility of it. The objection is overruled.

You are not a doctor, are you, ma'am?

THE WITNESS: No. I was an administrator of a nursing home. I am a social worker and a teacher and a person.

Q [By Mr. Weinstein] When you were out there, you did state in answer to Mr. Helfand's question that there was a dangerous situation.

Let me rephrase the question for you if I may.

Was the situation such a condition that there would be substantial risk of life-threatening physical harm or deterioration to Ms. Turner or to Mr. Byrne?

A I feel so, yes.

Q Would you specify with more particularity as to exactly what that would be?

A Okay. If Ms. Turner just gets off the bed and falls again.

Q Am I not correct in stating that when she did fall down that Mr. Byrne did call the police and they did take care of her?

A How many hours did they wait?

Q Please, answer the question.

When Ms. Turner did fall down, Mr. Byrne did use the phone in the house to call the police, am I correct?

A This time, yes.

Q Am I correct?

A Yes, you are correct, sir.

Q And she was taken to the emergency room of Jackson Memorial Hospital?

A No, sir, she was not.

Q Where was she taken?

A At that time--- She was not taken at that time for that.

Q Did the police---

A I misunderstood you, I am sorry.

Q When Mr. Byrne called up the police indicating that Ms. Turner fell down and was unable to get up, did they come over and take her to a facility?

A I can't answer that yes or no.

Q You do not know?

A Because it is st ting it incorrectly.

They came over and did not--- They picked her up, put her back on the dirty mattress, waited and decided those two people should be Baker Act.

Q But Mr. Byrne was able to call up and the police officers did come over to give them assistance?

A This time, yes. Yes, okay.

Q What other conditions do you think are in the house wherein they would be involved in some substantial life-threatening physical harm or deterioration?

A Touching one of the electrical wires that are hanging, sitting in your own excrement for days on end, eating surrounded with it.

I don't know what was moving there, but I surely heard movement of some sort. I don't know if it's rodents.

Q Do you have any knowledge that they were eating any of the excrement?

A No, I have no knowledge.

Q Do you have any knowledge that they were touching any wires?

A The wires had definitely been touched. They were hanging so that somebody had to have opened up those bulbs and brought them down. They were hanging from wires that were not screwed up. They were hanging. Somebody had to have done something in that house.

Q But you do not know specifically that they were fooling around with wires?

A No.

Q Do you know if anybody comes and cleans their house on a regular basis?

A Nobody comes and cleans their home.

MR. WEINSTEIN: I have no further questions at this point in time, Your Honor.

THE COURT: Next witness?

MR. HELFAND: I would like to call Mr. Watts from the Minimum Housing.

THE COURT: To what is he going to testify, sir?

MR. HELFAND: The dangerous conditions in the house--

THE COURT: Do you stipulate to this?

MR. WEINSTEIN: I will stipulate to the testimony that---

MR. HELFAND: [Continuing] --that are life-threatening.

MR. WEINSTEIN: I will stipulate that there are violations of the minimum housing code as such.

THE COURT: Including but not limited to bare wires, which, of course, could be life-threatening. You will stipulate to that, sir?

MR. WEINSTEIN: I will stipulate again, Your Honor,

to the point that there are violations of the housing code in connection with that house, that the house has not been condemned and people are able to live in that house. I will stipulate to that at this point in time.

MR. HELFAND: That is what we want to find out. I imagine they are moving towards condemning it.

THE COURT: All right. Let the gentleman come here, please.

Thereupon:

ANTHONY WATTS

was called as a witness by the Petitioner and, having been first duly sworn, was examined and testified upon his oath as follows:

THE COURT: What is your full name, please, sir?

THE WITNESS: Anthony Watts.

THE COURT: By whom are you employed, sir?

THE WITNESS: Dade County.

THE COURT: In what capacity, sir?

THE WITNESS: Supervisor, housing inspections.

THE COURT: For what period of time?

THE WITNESS: Seven years.

DIRECT EXAMINATION

BY MR. HELFAND:

Q Now, are you trained to observe conditions that would be dangerous to people residing therein?

A Yes, I am.

Q Are you familiar with the residence of Herbert Michael Byrne and Norma Turner at 4170 Southwest 96th Avenue?

A Yes, I am.

Q On what occasion have you been there?

A On the 6th of this month. I received--- Our office received a call from Officer Hupp and I subsequently went out to the address. I met Officer Hupp there. I made a housing code inspection of the property.

Q What is the current status of your work as far as the house is concerned?

A I found that there was a condition existing with the roof. And also there was an emergency condition existing with the bathroom.

I made a housing code inspection of the property. I subsequently issued an emergency order to the owner.

Q What does the order say?

A The emergency order states that she has 72 hours to make corrections. Because of the fact that the roof is leaking, it has caused portions of the plaster ceiling to sag, crack and fall and other portions to be in immediate danger of falling.

Q What would be the next step if they do not comply with the emergency order?

A Our office has the power, we handle each case on an individual basis, but we have the power to go into court to order the repairs made.

Q What is the emergency nature of the conditions that you found?

A Well, as I said, there is a roof leak at the property and there is danger to the occupants of the roof, the plaster ceiling, collapsing and falling on someone.

There's also the problem with the water closet waste line being clogged and making it inoperable.

Q The toilet is presently inoperable?

A Yes, the water closet is the toilet.

Q And it is presently inoperable?

A Yes, it is at this time.

Q Is there anything else that poses an immediate danger?

A There were other violations. There were some electrical problems with some of the light fixtures being improperly installed and some dangling wires.

There were other minor violations to the housing code, but those were the major violations, the roof and the bathroom facilities.

Q What would happen if they---

I have nothing further.

CROSS-EXAMINATION

BY MR. WEINSTEIN:

Q You stated that these were dangerous conditions, am I correct?

A Yes, sir.

Q Are these people able to remain in their house as of right now?

A Well, the code says that they're detrimental to the health, safety or welfare of the occupants.

Are you asking can---

Q Are they permitted there under the law in these conditions as the law is promulgated in Dade County?

A Are you saying is he permitted to occupy the building? I could not answer the question.

There are violations there. They are held responsible to correct the violations.

If they choose to occupy the building during that time, that is their personal preference.

Q Let me rephrase the question: That house has not been condemned, am I correct?

A No, it is not condemned.

Q They are permitted under the law if they want to keep residing there until they fix the place up, under this emergency situation, am I correct?

A Yes, they can.

Q You state you have been on this job, am I correct?

A Correct.

Q Have you in your experience seen conditions worse than you saw in the Turner home?

A Yes, I have.

Q Have people resided in conditions worse than in the Turner home?

A Unfortunately yes.

Q But they are permitted again under the code of Dade County to remain in a facility, in their dwelling, until again they get the house fixed as required by the minimum code?

A Well, not necessarily permitted but the way the law is structured, they are allowed--- In answer to your question, yes.

Q You stated that the roof is falling down.

A There are portions of the ceiling, not the roof, the ceiling.

Q How is the structure of the house, the outside of the house?

A The house is structurally sound.

Q Beforehand, have you gotten any information in connection with this house outside of these initial violations? Have there been any violations to this home before this?

A No, looking at the building from the street, except for the overgrown condition of the premises, the building looks structurally sound. But it would normally not have been picked up for inspection by our agency.

MR. WEINSTEIN: I have no further questions.

MR. HELFAND: Nothing further.

THE COURT: May we excuse this gentleman?

Thank you very much, sir.

MR. HELFAND: We would rest our case.

MR. WEINSTEIN: At this point in time, the State of Florida through HRS has rested.

I am going to move for, I guess, a judgment of acquittal in that the State of Florida has not proved their burden of probable cause in connection with the criteria under the Act, in connection with suffering from infirmities of age and to the extent that the person is substantially impaired in his ability adequately to provide for his own care and protection.

There has been no testimony in connection with that particular criteria.

There has been no substantial testimony in connection with their substantial risk of life-threatening physical harm or deterioration outside of the conditions elaborated by the housing inspector who said that these individuals can occupy the dwelling.

Again, it is very important to read the Act together and, if I may, it states again that, "'Infirmities of aging' means organic brain damage, advanced age, or other physical, mental or emotional dysfunctioning in connection therewith, to the extent that the person is substantially impaired in his ability adequately to provide for his own care or protection."

It goes on to state, "'Emergency services' means the Court ordered removal of an individual suffering from the infirmities of aging"--as I just described in the definition--"from his present surroundings. Emergency services may be received involuntarily if a person entitled to the services will incur a substantial risk of life-threatening physical harm or deterioration if the services are not provided."

I am saying that there is a condition precedent to proving that there is, in fact, infirmity of aging as enunciated by 410.102, Subsection 1.

The State of Florida has not proven that these individuals have any infirmities of aging and, therefore, are substantially impaired in their ability to adequately provide for their own care and protection.

They have only stated that the house is in disrepair. It needs to be fixed. There are leakages. There are housing code violations. That occurs all through

Dade County and the State of Florida.

These occupants do have the responsibility to fix these. If they do not fix these conditions as specified, then they will be in direct violation of the minimum housing code.

But you must read the statute in context if in fact they are looking for the protective services of HRS.

Therefore, I move on that basis that the State has not proven probable cause to detain these individuals based upon the violations of the housing code of the State of Florida.

By doing so, that would be tantamount to depriving somebody of their liberty just because the house itself is in violation of the Dade County housing code.

MR. HELFAND: I think the stronger proof if anything is that they are substantially impaired based on the evidence of what has been allowed to happen in this particular environment. I think we can conclude that they have been substantially impaired as far as the substantial risk of life-threatening physical harm or deterioration.

I think that the evidence indicates that there is a threat of physical harm and deterioration if they are allowed to continue under the circumstances without any help.

We could almost predict that they will not be able to survive in this environment.

I think one of the purposes of this particular hearing is to put our heads together and see how they could possibly survive.

One way that they could, which we all want to see them go home and be able to stay in the particular place that they want to reside, is to have them have some services there.

One of the services that is presently being provided is to clean the place, not in the sense that we are concerned about how neat they are, but if there is excrement, I think the Court could take judicial notice of the risk of disease in that, from that viewpoint and, secondly, from the viewpoint of someone falling down in that type of environment.

So I think as a practical matter the question that faces the Court, they definitely will be going home, the only question is should they go home immediately upon the conclusion of the hearing or should they be held for another day or two until the place can be put in a less dangerous condition and until some of the services can be provided which will insure that there is a chance of actually surviving in that environment?

MR. WEINSTEIN: Mr. Helfand is begging the question in connection with the actual contravention of the Act itself.

The purpose behind the Act, as I stated, in the

condition precedent to finding that there is infirmities of aging. He has been making a speculation that they are infirm, that they have the inability to take care of themselves just because they live in the conditions as described by the social worker and the housing authorities as such.

Again, there is no law outside of the minimum housing code to prevent these people to do as they wish. They have that right.

The State has not proven, again, their burden to detain these people for any period of time, notwithstanding the conditions of the facility, of their home.

I can understand their humanitarian approach to the problem, but again these individuals are being deprived of their liberty and are remaining in the emergency setup because the State of Florida wants to fix the house.

I am saying the State has not proven their burden of probable cause in connection with the detaining of these individuals for any period of time since the housing inspector has stated that they are permitted to live in their dwelling.

So, therefore, I move on that ground for motion for judgment of acquittal.

THE COURT: Before you do, sir---

Would you give me your full name, sir?

DR. MAJIO: Dominic Majio.

THE COURT: And what is your profession, sir?

DR. MAJIO: I am a physician licensed in the State of Florida.

THE COURT: Where are you stationed, or where do you practice medicine?

DR. MAJIO: At the present time I am the senior resident in Jackson Memorial emergency room.

THE COURT: You are familiar with this case, are you not, sir?

DR. MAJIO: Yes, sir.

THE COURT: May I have your name, please, sir?

DR. O'CONNELL: Mark O'Connell.

THE COURT: And what is your profession?

DR. O'CONNELL: Physician.

THE COURT: What year are you in, sir?

DR. O'CONNELL: My first year.

THE COURT: You are an intern?

DR. O'CONNELL: Yes, sir, that is right.

THE COURT: Where do you practice your profession or where are you stationed, sir?

DR. O'CONNELL: At this time, Jackson emergency.

THE COURT: Are you familiar with these two people?

DR. O'CONNELL: Very much so.

THE COURT: Let the record reflect that it is the opinion of this Court, based and predicated upon the statute,

that some degree of proof must be adduced that the persons who are the respondents in said cause are in need of some degree of care or medical treatment.

This record is totally silent on that particular subject.

And I feel that under the circumstances it was an essential part of the State's case.

These two witnesses are here as I have identified them for the record upon questioning them about the case. They are silent and the record is silent as to any medical testimony given in this record.

Accordingly, it is my duty to grant defense counsel's motions. Both motions are granted and the causes are discharged.

Thank you very much, gentlemen.

Submit an order on it.

MR. WEINSTEIN: Yes, sir.

THE COURT: Let the record reflect that further, I want an order of discharge, immediate discharge, submitted for insufficient evidence to continue the treatment and the--- The word incarceration is a poor word--continued holding of the respondents.

Also I want an order, a separate and distinct order, relative to the constitutional question upon which I have ruled.

Let the record further show that the Court is ordering the authorities at Jackson to release the two respondents in standard immediately and the order will be prepared next week. Next week will be fine.

MR. WEINSTEIN: It will be Monday, sir.

THE COURT: Thank you, gentlemen.

[Thereupon, the proceedings were concluded.]

- - -

CERTIFICATE

STATE OF FLORIDA)
: SS.
COUNTY OF DADE)

I, PAULA J. DUNDON, a Registered Professional Reporter, hereby certify that the foregoing transcript, pages 1 through and including 45, is a true and correct transcription of my stenographic notes of the proceedings had and testimony taken in the matter of Herbert Byrne and Norma Turner, Nos. 79-4062 and 79-4063, before the Honorable Francis J. Christie, at the Dade County Courthouse, Miami, Florida, on the 8th day of June, 1979.

DATED at Miami, Dade County, Florida, this 23 day of June, 1979.

PAULA J. DUNDON, Court Reporter

Best Copy Available

In re Herbert BYRNE.

In re Norma TURNER.

Nos. 57314, 57315.

Supreme Court of Florida.

June 25, 1981.

Rehearing Denied Sept. 9, 1981.

Pursuant to provision of the Adult Protective Services Act authorizing the Department of Health and Rehabilitative Services to take elderly persons into custody and transport them to a medical or protective service facility in an emergency situation without their consent, ex parte orders for emergency custody of two elderly persons were issued by the Circuit Court, Dade County, Francis J. Christie, J., and consolidated appeals were taken from order of the court denying motions to dismiss. The Supreme Court, Boyd, J., held that: (1) the action was not rendered moot by fact that one of the elderly persons had died and the other had been adjudicated incompetent, and (2) the statute did not violate due process.

Affirmed.

Sundberg, C. J., and England and Alderman, JJ., would have dismissed the appeal as moot.

1. Constitutional Law ⇐46(1)

Action challenging constitutionality of statute authorizing the Department of Health and Rehabilitative Services to take elderly persons into custody and transport them to a medical or protective service facility in an emergency situation without their consent was not mooted by fact that one of the persons for whom the action was brought had died and the other had been adjudicated incompetent since the case was a matter of great public importance in administration of the law and was of general interest to the public. West's F.S.A. § 410.104.

2. Constitutional Law ⇐255(5)
Mental Health ⇐32

Provision of the Adult Protective Services Act authorizing the Department of Health and Rehabilitative Services to take elderly persons into custody and transport them to a medical or protective service facility in an emergency situation without their consent comported with constitutional requirements of due process, and due process requirements for civil commitment proceedings of notice, an opportunity to be heard, and effective assistance of counsel were inapplicable. West's F.S.A. § 410.104; U.S.C.A.Const. Amend. 14.

3. Constitutional Law ⇐255(1)

In light of state's obligation to preserve life whenever it can, due process is not offended by temporary loss of liberty when person's life may be threatened. U.S.C.A. Const. Amend. 14.

Lester C. Wisotsky of the Legal Services of Greater Miami, Inc., Miami Beach, for appellants.

Jim Smith, Atty. Gen., and Brian E. Norton, Asst. Atty. Gen., Tallahassee, for appellee.

BOYD, Justice.

These consolidated cases are before the Court on appeal from judgments of the Circuit Court of the Eleventh Judicial Circuit, in Dade County, which upheld the constitutionality of section 410.104, Florida Statutes (1979). Under the jurisdictional provisions in effect at the time the notices of appeal were filed, jurisdiction of the appeals lay with this Court. Art. V, § 3(b)(1), Fla. Const. (1972).

On June 5, 1979, a social worker visited the appellants in their home and found them completely naked, surrounded by debris and excrement. Herbert Byrne, age 79, had called for help because his niece Norma Turner had fallen and he was unable to get her up. The social worker found that the plumbing was not working, parts of the ceiling were falling, and wires were dangling. A police officer took the appellants to a hospital.

Best Copy Available

The next day the social worker filed petitions for emergency orders of custody pursuant to section 410.104, Florida Statutes (1979). The court, *ex parte*, immediately issued orders for emergency custody. On the following day, he appointed counsel for the appellants.

On June 8, 1979, the appointed attorneys filed motions to dismiss the petitions on the ground that the emergency procedures provided for by section 410.104 are unconstitutional. The judge held a hearing that same day. The judge denied the motions to dismiss, but found that there was insufficient evidence to establish a need for continued services. On June 13, the court issued an order denying the motion to dismiss and rendered a judgment "acquitting" the appellants from further involuntary custody. This appeal of the denial of the motion to dismiss followed.

[1] Since the time the notices of appeal were filed, Herbert Byrne has died and Norma Turner has been adjudicated incompetent. It is arguable that the controversy has therefore been rendered moot. We retain jurisdiction, however, "since this is a matter of great public importance in the administration of the law and is of general interest to the public." *Sadowski v. Shevin*, 345 So.2d 330, 331-32 (Fla. 1977); *see also Clark v. State ex rel. Rubin*, 122 So.2d 807 (Fla. 3d DCA 1960).

Section 410.104, Florida Statutes (1979), authorizes the Department of Health and Rehabilitative Services to take elderly persons into custody and transport them to a medical or protective service facility in an emergency situation without their consent. The issue is whether this section comports with due process and is constitutional.

The statute provides as follows:

(1) Upon probable cause to believe that an individual suffering from the infirmities of aging is being abused, maltreated, or neglected, a representative of the department, accompanied by a law enforcement officer, may enter a premises, after obtaining a court order and announcing their authority and purpose. Forcible entry shall be attained only after a court order has been obtained, unless there is probable cause to believe that the delay incident to obtaining such an order would cause an individual suffering from the infirmities of aging to incur a substantial risk of life-threatening physical harm.

(2) When, from the personal observation of a representative of the department and a law enforcement officer, it appears probable that an individual suffering from the infirmities of aging is likely to incur a substantial risk of life-threatening physical harm or deterioration if not immediately removed from the premises, the department's representative may, when authorized by court order, take into custody and transport, or make arrangements for the transportation of, the individual to an appropriate medical or protective services facility.

(3) When action is taken under this section, a preliminary hearing shall be held within 48 hours, excluding Saturdays, Sundays, and legal holidays, to establish probable cause for grounds for protective placement.

(4) Upon a finding of probable cause, the court may order temporary placement for up to 4 days, pending the hearing for a need for continuing services.

(5) When emergency services are rendered, a report of the exact circumstances, including the time, place, date, factual basis for the need for such services, and the exact services rendered, shall be made and forwarded as provided for in s. 827.09.

§ 410.104, Fla.Stat. (1979).

The section under consideration is part of the Adult Protective Services Act, §§ 410.10-410.11, Fla.Stat. (1979). This statute was enacted to protect adults suffering from the "infirmities of aging" from "exploitation, neglect, abuse, and maltreatment" with "the least possible restriction on personal liberty and the exercise of constitutional rights, consistent with due proces...." § 410.101, Fla.Stat. (1979).

The term "infirmities of aging" is defined to mean "organic brain damage, advanced

Best Copy Available

age, or other physical, mental, or emotional disfunctioning in connection therewith, to the extent that the person is substantially impaired in his ability adequately to provide for his own care or protection." § 410.-102(1), Fla.Stat. (1979).

Section 410.103, Florida Statutes (1979), provides certain conditions governing the authority of the Department of Health and Rehabilitative Services to provide services:

(1) CONDITIONS FOR PROVIDING SERVICES.—The department shall provide protective services in response to complaints concerning, and requests for assistance from or on behalf of, individuals suffering from the infirmities of aging. The department shall provide such services under any of the following conditions:

(a) The person demonstrates a need for, and requests, such services.

(b) An interested person requests such services on behalf of a person in need of services.

(c) The department determines a person is in need of such services.

(d) A court orders such services.

(2) VOLUNTARY SERVICES.—An individual shall receive protective services voluntarily unless ordered by the court, requested by a guardian, or provided in accordance with s. 410.104.

Section 410.104(2) authorizes the department to relocate elderly persons without their consent who are "likely to incur a substantial risk of life-threatening physical harm or deterioration if not immediately removed from the premises. . . ." This subsection also provides two procedural safeguards. First, both a representative of the department and a law enforcement officer must personally observe the emergency situation. Second, the relocation may be imposed only when authorized by court order. Even then such relocation cannot be imposed without consent for more than forty-eight hours. § 410.102(6), Fla.Stat. (1979).

Within the forty-eight hour period, a preliminary hearing must be held to determine whether there is probable cause for protective placement. § 410.104(3). At the hearing the allegations of the petition, that the person is suffering from the infirmities of aging and that there is a substantial risk of life-threatening physical harm or deterioration, must be proved. If the allegations are proved, the court may order temporary placement pending a hearing on the need for continuing protective services. § 410.-104(4).

[2] We hold that these procedures comport with the constitutional requirements of due process. The appellants' attorney argues that due process requires notice, an opportunity to be heard, and effective assistance of counsel, citing *Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967) and *In re Beverly*, 342 So.2d 481 (Fla. 1977). We find these requirements for civil commitment proceedings to be inapplicable to situations such as are reached by the statute under consideration. The purpose of this statute is not to incarcerate or confine mentally incompetent persons by commitment to state custody, but rather to free persons suffering from infirmities of aging from dangerous or oppressive conditions. The stated purpose of the statute—to protect the elderly—is genuine and not a euphemism for punishment. *Compare In Re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) (fact that purpose of juvenile delinquency proceedings was rehabilitation and protection of child rather than criminal punishment did not justify denial of all due process rights).

[3] Furthermore, the statute is limited to the situation of an emergency. The state, in such situations, must fulfill its obligation to preserve life whenever it can. *See Satz v. Perlmutter*, 362 So.2d 160 (Fla. 4th DCA 1978), *aff'd*, 379 So.2d 359 (Fla. 1980). This responsibility must be balanced against an individual's rights of self-determination and privacy. Under normal conditions, the state may not enter a person's home, take custody, and transport the person to another location without following the strict procedures of criminal prosecution or civil commitment. Due process, however, is not offended by a temporary loss of

Best Copy Available

liberty when a person's life may be threatened. *See Fhagen v. Miller*, 29 N.Y.2d 348, 328 N.Y.S.2d 393, 278 N.E.2d 615, *cert. denied*, 409 U.S. 845, 93 S.Ct. 47, 34 L.Ed.2d 85 (1972).

Removing an individual from an environment as unhealthy as the one in this case is essential to making a proper determination of whether the individual should be temporarily or permanently placed elsewhere. The wishes of the individual should be highly regarded and adequately represented, since the statute is designed for his benefit. The legislature recognized that some elderly people may in effect be held hostage by others or by their own environment. They may not know what is best for them or even know what they want after living under such conditions. Thus, relocating such persons and providing them with proper nourishment and medication is necessary to help them to regain a proper perspective on life so they can make a deliberate and unconstrained decision on whether to return.

Appellants' attorney argues that the court's authority to order continuing services is unconstitutionally vague and may lead to an indefinite period of involuntary commitment. We do not believe so. Reading the statute as a whole we find that continuing services should be ordered only until the person is no longer facing a substantial risk of life-threatening harm or deterioration. After that point the department can no longer render any services which are not voluntarily received.

Finally, appellants' attorney argues that the state lacks the authority under the *parens patriae* doctrine to impose services, treatment, and confinement upon competent elderly persons. We first note that under no circumstances can medical treatment be forced upon a person "in contravention of the stated or implied objection of such person." § 410.101, Fla.Stat. (1979). We further note that

> the *parens patriae* notion [is] that the state is the ultimate guardian of those of its citizens who are incapable of caring for their own interest. (Citations omitted). Valid exercise of the *parens patriae* power presumes an incapability to manage one's affairs that approximates, if it is not identical with, legal incompetence to act.

In re Beverly, 342 So.2d at 485, *quoting Lynch v. Baxley*, 386 F.Supp. 378, 390-91 (M.D.Ala. 1974). People whose mental and physical capabilities are deteriorating because of old age may be approximating legal incompetency. Thus the state has the authority to exercise its *parens patriae* powers when it appears such persons are incapable of caring for themselves.

We affirm the trial court's order denying the motion to dismiss.

It is so ordered.

ADKINS, OVERTON and McDONALD, JJ., concur.

SUNDBERG, C. J., and ENGLAND and ALDERMAN, JJ., would dismiss the appeal as moot.

STATE of Florida, Appellant,

v.

Robert K. WERNER and Jack E. Carlson, Appellees.

No. 57929.

Supreme Court of Florida.

June 25, 1981.

Rehearing Denied Sept. 8, 1981.

Defendants were charged with trafficking in cocaine. The Circuit Court, Dade County, Wilkie D. Ferguson, Jr., J., dismissed the charges and declared statute to be unconstitutional, and State appealed. The Supreme Court, England, J., held that word "may" within statutory provision that

Supreme Court of Florida

WEDNESDAY, SEPTEMBER 9, 1981

In Re: HERBERT BYRNE	CASE NO. 57,314 Circuit Court No. 79-4062 (Dade)
In Re: NORMA TURNER	CASE NO. 57,315 Circuit Court No. 79-4063 (Dade)
	(CONSOLIDATED CASES)

Upon consideration of the Motion for Rehearing filed in the above styled causes by the attorney for Appellants, and response thereto,

IT IS ORDERED that said Motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Tanya Carroll
Deputy Clerk

TC
cc: Hon. Francis J. Christie, Judge
Hon. Richard P. Brinker, Clerk

Lester C. Wisotsky, Esquire
Kent A. Zaiser, Esquire
Leonard Helfand, Esquire
Hon. Janet Reno

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

FILED
NOV. 23, 1981

IN RE: HERBERT BYRNE, CASE NO. 57,314

x x x x x x x x x x x

IN RE: NORMA TURNER, CASE NO. 57,315
(CONSOLIDATED CASES)

Appellant.

/

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE
UNITED STATES

NOTICE IS HEREBY GIVEN that NORMA TURNER, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the Judgment of the Supreme Court of the State of FLorida, becoming final on September 9, 1981, affirming the corrected Order Denying Motion To Dismiss, rendered by the trial court in this action on June 13, 1979.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

LEGAL SERVICES OF GREATER MIAMI, INC,

By Lester C. Wisotsky

LESTER C. WISOTSKY
Attorney for Appellant
7900 N.W. 27th Avenue
149 West Plaza, Suite 210
Miami, Florida 33147
Telephone: [305] 693-6810

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of December, 1981, a true and correct copy of the foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES was mailed, postage prepaid to: KENT A. ZAISER, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32304, LEONARD HELFAND, ESQUIRE, Department of Health and Rehabilitative Services, District XI, 401 N.W. 2nd Avenue, Room 1070, Miami, Florida 33128 and JANET RENO, State Attorney, 1351 N.W. 12th Street, Miami, Florida 33125. I FURTHER CERTIFY that all parties required to be served were served.

Bob C. Wisotsky

LESTER C. WISOTSKY
Attorney for Appellant

11/19/81

family placement program.

(2) The caretaker of a person enrolled in the family placement program shall be reimbursed according to a rate schedule set by the department.

(3) While participation in the family placement program will provide the elderly person with adequate assistance to meet the normal demands of daily living, clients may also be enrolled in a home-delivered service program or a multi-service senior center program.

History.—s. 2, ch. 78-51, s. 19, ch. 78-433.
Note.—Former s. 409.3630.

410.031 Legislative intent.—It is the intent of the Legislature to encourage the provision of care for the elderly in family-type living arrangements in private homes as an alternative to institutional or nursing home care for such persons. The provisions of ss. 410.031-410.036 are intended to be supplemental to the provisions of chapter 400, relating to the licensing and regulation of nursing homes and adult congregate living facilities, and shall not operate to exempt any person who is otherwise subject to regulation under the provisions of said chapter.

History.—s. 13, ch. 77-336, s. 15, ch. 78-433, s. 105, ch. 79-164.
Note.—Former s. 409.3644.

410.032 Definitions.—As used in ss. 410.031-410.036:

(1) "Elderly person" means any person 65 years of age or over who is currently a resident of this state and has resided in this state for no less than 1 year.

(2) "Home care for the elderly" means a full-time family-type living arrangement, in a private home, under which a person or group of persons provides, on a nonprofit basis, basic services of maintenance and supervision, and any necessary specialized services as may be needed, for three or fewer elderly relatives or nonrelatives.

(3) "Department" means the Department of Health and Rehabilitative Services.

History.—s. 14, ch. 77-336, s. 15, ch. 78-433, s. 106, ch. 79-164.
Note.—Former s. 409.3645.

410.033 Home care for the elderly; rules.—The department shall by rule establish minimum standards and procedures for the provision of home care for the elderly, and for the approval of persons wishing to provide such care. Any person who is approved by the department to provide such care for an elderly person shall be eligible for the subsidy payments described in s. 410.035.

History.—s. 15, ch. 77-336, s. 15, ch. 78-433, s. 107, ch. 79-164.
Note.—Former s. 409.3646.

410.034 Department determination of unfitness to provide home care; judicial review.—In accordance with the provisions of s. 400.402, a person caring for an adult who is related to such person by blood or marriage shall not be subject to the provisions of the Adult Congregate Living Facilities Act. If, however, the home care to be provided by such person under this act is found by the department to be unfit, the person wishing to provide home care shall be notified by the department of such unfitness, and the person shall not be eligible for subsidy payments under ss. 410.031-410.036. A person wishing to provide care under ss. 410.031-410.036, but whose home has been found unfit by the department may petition the circuit court having jurisdiction over the home found unfit, and the court shall resolve the question of fitness.

History.—s. 16, ch. 77-336, s. 15, ch. 78-433, s. 108, ch. 79-400.
Note.—Former s. 409.3647.

410.035 Subsidy payments.—

(1) The department shall establish by rule, effective January 1, 1978, a schedule of subsidy payments to be made to persons providing home care for certain eligible elderly persons. Payments shall be no less than 10 percent of the prevailing rate paid by the department for the lowest level of nursing home care under s. 409.266, and no greater than 45 percent of said amount. Payments shall be based on the financial status of the person receiving care. Payments shall include, but not be limited to:

(a) A support and maintenance element, to include costs of housing, food, clothing, and incidentals.

(b) Payments for medical, pharmaceutical, and dental services essential to maintain the health of the elderly person and not covered by medicare, medicaid, or any form of insurance.

(c) When necessary, special supplements to provide for any service and specialized care required to maintain the health and well-being of the elderly person.

(2) The department shall develop a plan for the implementation of a program of uniform subsidy payments to persons providing home care for the elderly.

History.—ss. 17, 19, ch. 77-336, s. 15, ch. 78-433.
Note.—Former s. 409.3648.

410.036 Eligibility for services.—Criteria for determining eligibility for this program shall be the same as criteria used to determine eligibility for assistance under Title XVI of the Social Security Act as the same exists on July 1, 1977, or shall be the same as financial criteria used to determine eligibility for nursing home care under s. 409.266.

History.—s. 18, ch. 77-336, s. 15, ch. 78-433.
Note.—Former s. 409.3649.

410.10 Short title.—Sections 410.10-410.11 shall be known and may be cited as the "Adult Protective Services Act."

History.—s. 1, ch. 77-336, s. 19, ch. 78-433, s. 109, ch. 79-164.
Note.—Former s. 409.3631.

410.101 Legislative intent.—The Legislature recognizes that there are many adults in this state who, because of the infirmities of aging, are in need of protective services. Such services should allow the individual the same rights as other citizens, and at the same time protect the individual from exploitation, neglect, abuse, and maltreatment. It is the intent of the Legislature to provide for the detection and correction of exploitation, neglect, abuse, and maltreatment, and to establish a program of protective and supportive services for all adults in need of them. In doing so, the Legislature intends to place the least possible restriction on personal liberty and the exercise of constitutional rights, consistent with due process and protection from abuse, exploitation, and maltreatment. Nothing in this act shall be con-

strued to mean a person is abused, neglected, or in need of emergency or protective services for the sole reason he is being furnished or relies upon treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination; nor shall anything in this act be construed to authorize, permit, or require any medical care or treatment in contravention of the stated or implied objection of such person.

History.—s. 2, ch. 77-336, s. 18, ch. 78-433.
Note.—Former s. 409.3632.

410.102 Definitions.—As used in ss. 410.10-410.11:

(1) "Infirmities of aging" means organic brain damage, advanced age, or other physical, mental, or emotional disfunctioning in connection therewith, to the extent that the person is substantially impaired in his ability adequately to provide for his own care or protection.

(2) "Protective services" means those services the objective of which is to protect individuals suffering from the infirmities of aging. Such protective services shall include, but shall not be limited to, evaluation of the need for services, arrangements for appropriate living quarters, obtaining financial benefits to which the person is entitled, or securing medical and legal services. In those situations where exploitation, prevention of injury, and protection of the person and his property are at issue, protective services shall include seeking the appointment of a guardian for the person or seeking protective placement.

(3) "Abuse" or "maltreatment" means treatment under which an individual suffering from the infirmities of aging is deprived, or allowed to be deprived, of food, clothing, shelter or medical treatment essential to his well-being, or is permitted to live in an environment, when such deprivation or environment causes, or is likely to cause, the adult's physical or emotional health to be significantly impaired.

(4) "Exploitation" means an unjust or improper use of another person for one's own profit or advantage.

(5) "Department" means the Department of Health and Rehabilitative Services.

(6) "Emergency services" means the court ordered removal of an individual suffering from the infirmities of aging from his present surroundings. Emergency services may be received involuntarily if the person entitled to the services will incur a substantial risk of life-threatening physical harm or deterioration if the services are not provided. Such emergency services may not be provided by the department for more than 48 hours.

(7) "Neglect" means to omit, forbear, or fail to exercise a degree of care and caution that a prudent person would deem essential to insure the well-being of an individual suffering from the infirmities of aging and, by such omission, forbearance, or failure, significantly impair or jeopardize the physical or emotional health of the individual suffering from the infirmities of aging.

History.—s. 3, ch. 77-336, s. 18, ch. 78-433, s. 109, ch. 79-164.
Note.—Former s. 409.3633.

410.103 Protective services.—

(1) CONDITIONS FOR PROVIDING SERVICES.—The department shall provide protective services in response to complaints concerning, and requests for assistance from or on behalf of, individuals suffering from the infirmities of aging. The department shall provide such services under any of the following conditions:

(a) The person demonstrates a need for, and requests, such services.

(b) An interested person requests such services on behalf of a person in need of services.

(c) The department determines a person is in need of such services.

(d) A court orders such services.

(2) VOLUNTARY SERVICES.—An individual shall receive protective services voluntarily unless ordered by the court, requested by a guardian, or provided in accordance with s. 410.104.

History.—s. 4, ch. 77-336, s. 18, ch. 78-433, s. 110, ch. 79-164.
Note.—Former s. 409.3634.

410.104 Emergency services.—

(1) Upon probable cause to believe that an individual suffering from the infirmities of aging is being abused, maltreated, or neglected, a representative of the department, accompanied by a law enforcement officer, may enter a premises, after obtaining a court order and announcing their authority and purpose. Forcible entry shall be attained only after a court order has been obtained, unless there is probable cause to believe that the delay incident to obtaining such an order would cause an individual suffering from the infirmities of aging to incur a substantial risk of life-threatening physical harm.

(2) When, from the personal observation of a representative of the department and a law enforcement officer, it appears probable that an individual suffering from the infirmities of aging is likely to incur a substantial risk of life-threatening physical harm or deterioration if not immediately removed from the premises, the department's representative may, when authorized by court order, take into custody and transport, or make arrangements for the transportation of, the individual to an appropriate medical or protective services facility.

(3) When action is taken under this section, a preliminary hearing shall be held within 48 hours, excluding Saturdays, Sundays, and legal holidays, to establish probable cause for grounds for protective placement.

(4) Upon a finding of probable cause, the court may order temporary placement for up to 4 days, pending the hearing for a need for continuing services.

(5) When emergency services are rendered, a report of the exact circumstances, including the time, place, date, factual basis for the need for such services, and the exact services rendered, shall be made and forwarded as provided for in s. 827.09.

History.—s. 5, ch. 77-336, s. 18, ch. 78-433.
Note.—Former s. 409.3635.

410.105 Confidentiality.—Any records of the department or other agency pertaining to a person who is protected under ss. 410.10-410.11 or for whom application has ever been made for such protection are not open to public inspection. Information contained in such records may not be disclosed publicly in such a manner as to identify individuals, but the records shall be available, on application and for cause, to persons approved by the court.

History.—s. 6, ch. 77-336, s. 19, ch. 78-433, s. 169, ch. 79-400
Note.—Former s. 409.3636.

410.106 Reports of abuse.—Any person, including, but not limited to, any social worker, physician, psychologist, nurse, teacher, or employee of a private or public facility serving adults, who has a reason to believe an individual suffering from the infirmities of aging has been subjected to abuse, maltreatment, or exploitation shall report, or cause reports to be made, to the department in accordance with s. 827.09.

History.—s. 7, ch. 77-336, s. 19, ch. 78-433.
Note.—Former s. 409.3637.

410.107 Rules to be promulgated.—The Department of Health and Rehabilitative Services shall set forth by rule, if it deems necessary, the procedures by which protective services, emergency services, and temporary protective placement, as provided in ss. 410.10-410.11, shall be implemented.

History.—s. 8, ch. 77-336, s. 19, ch. 78-433, s. 170, ch. 79-400
Note.—Former s. 409.3638.

410.108 Cooperation with law enforcement and other agencies.—

(1) All state, county, and municipal law enforcement agencies shall cooperate with the department and its employees in carrying out the provisions of ss. 410.10-410.11.

(2) Any funds appropriated by counties for home health care or boarding home, foster home, or nursing home services may be matched by state and federal funds; such funds shall be utilized by the Department of Health and Rehabilitative Services for the benefit of individuals suffering from the infirmities of aging in said counties.

(3) The Department of Health and Rehabilitative Services may purchase services from any public or private institution or agency within the state which meets the standards and rules for the proper care and supervision of abused adults prescribed by the department.

History.—s. 9, ch. 77-336, s. 19, ch. 78-433, s. 171, ch. 79-400
Note.—Former s. 409.3639.

410.109 Immunity.—Anyone participating in the making of a report or performing duties under ss. 410.10-410.11 or participating in a judicial proceeding resulting therefrom shall be presumed prima facie to be acting in good faith and in so doing shall be immune from any liability, civil or criminal, that otherwise might be incurred or imposed. Further, no resident or employee of a facility serving disabled persons shall be subjected to reprisal or discharge because of his actions in reporting abuse pursuant to the requirements of this section.

History.—s. 11, ch. 77-336, s. 19, ch. 78-433, s. 172, ch. 79-400
Note.—Former s. 409.3641.

410.11 Penalties.—

(1) Any person who knowingly or willfully abuses, neglects, exploits, or maltreats an individual suffering from the infirmities of aging and, in so doing, causes great bodily harm, permanent disfigurement, or permanent disability to such person is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) Any person who knowingly or willfully abuses, neglects, exploits, or maltreats an individual suffering from the infirmities of aging and, in so doing, causes minor injury, temporary disfigurement, or temporary disability to such person is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—s. 12, ch. 77-336, s. 19, ch. 78-433
Note.—Former s. 409.3642.

410.30 Displaced homemakers; multi-service programs for.—

(1) INTENT.—It is the intent of the Legislature to require the Department of Health and Rehabilitative Services to establish and implement multipurpose service programs to provide necessary training, counseling, and services for displaced homemakers so that they may enjoy the independence and economic security vital to a productive life.

(2) DEFINITIONS.—For the purposes of this act:

(a) "Displaced homemaker" means an individual who:

1. Is 35 years of age or older;

2. Has worked in the home, providing unpaid household services for family members;

3. Is not gainfully employed;

4. Has had, or would have, difficulty in securing employment; and

5. Has been dependent on the income of another family member but is no longer supported by such income, or has been dependent on Federal assistance.

(b) "Department" means the Department of Health and Rehabilitative Services.

(3) DEPARTMENT POWERS AND DUTIES.—

(a) The Department shall establish, or contract for the establishment of, programs for displaced homemakers which shall include:

1. Job counseling, by professionals and peers, specifically designed for a person entering the job market after a number of years as a homemaker.

2. Job training and placement services, including:

a. Training programs for available jobs in the public and private sectors, taking into account the skills and job experiences of a homemaker and developed by working with public and private employers.

b. Assistance in locating available employment for displaced homemakers, some of whom could be employed in existing job training and placement programs.

c. Utilization of the services of the state employment service, which shall cooperate with the department in locating employment opportunities.

3. A well-person health clinic serving the needs of older women and staffed to the greatest extent possible by displaced homemakers.

4. Financial management services providing information and assistance with respect to insurance,

81-5827

IN THE SUPREME COURT OF
THE UNITED STATES OF AMERICA

RECEIVED
DEC 7 - 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CASE NO.

IN RE:

NORMA TURNER,

Appellant.

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

/

Pursuant to Rule 53(1) of the Rules of this Court, motion is hereby made that the Appellant be allowed to proceed In Forma Pauperis before this Court for the reasons stated in the attached Affidavit.

Respectfully submitted,

LEGAL SERVICES OF GREATER MIAMI, INC.

By Lester C. Wisotsky

LESTER C. WISOTSKY
Attorney for Appellant
7900 N.W. 27th Avenue
149 West Plaza, Suite 210
Miami, Florida 33147
Telephone: [305] 693-6810

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of December, 1981, a true and correct copy of the foregoing MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS was mailed, postage prepaid to: KENT A. ZAISER, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32304 and LEONARD HELFAND, ESQUIRE, Department of Health and Rehabilitative Services, District XI, 401 N.W. 2nd Avenue, Room 1070, Miami, Florida 33128, and JANET RENO, State Attorney, 1351 N.W. 12th Street, Miami, Florida 33125. I FURTHER CERTIFY that all parties required to be served were served.

Lester C. Wisotsky
LESTER C. WISOTSKY

11/19/81

RECEIVED
DEC 7 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF
THE UNITED STATES OF AMERICA

CASE NO.

IN RE:

NORMA TURNER,

Appellant.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF FLORIDA)
:SS
COUNTY OF DADE)

BEFORE ME, personally appeared DENIS DEAN, the duly appointed legal guardian of the person and property of NORMA TURNER (a certified copy of the order of guardianship is attached hereto and made a part hereof), who after being duly cautioned and sworn, deposes and says:

1. That this Affidavit is being executed for use in support of the Motion for Leave to Proceed In Forma Pauperis in the Supreme Court of the United States in a proceeding in which NORMA TURNER is the Appellant.

2. The Appellant is adversely affected by the rendition of the judgment of the Court below.

3. Because of her poverty, the estate of NORMA TURNER, over which I am the guardian, is unable to pay the fees and costs of the proceeding or give security therefore.

4. The Affiant believes that NORMA TURNER is entitled to the redress sought in this proceeding.

5. The nature of the proceeding and the issue involved is briefly stated as follows:

The nature of the proceeding is a civil appeal from a judgment rendered by the Supreme Court of Florida. The issue involved is whether "the Adult Protective Services Act," Chapter 410 of the Florida

Statutes, is violative of the Due Process Clause of the Fourteenth Amendment and the right to privacy provided by the United States Constitution.

FURTHER AFFIANT SAYETH NOT.

DENIS DEAN, Affiant

SWORN TO AND SUBSCRIBED before me this 23rd day of December, 1981.

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE

My Commission Expires:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of December, 1981, a true and correct copy of the foregoing AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS was mailed, postage prepaid to: KENT A. ZAISER, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32304, LEONARD HELFAND, ESQUIRE, Department of Health and Rehabilitative Services, District XI, 401 N.W. 2nd Avenue, Room 1070, Miami, Florida 33128 and JANET RENO, State Attorney, 1351 N.W. 12th Street, Miami, Florida 33125. I FURTHER CERTIFY that all parties required to be served were served.

LEGAL SERVICES OF GREATER MIAMI, INC.

By
LESTER C. WISOTSKY
Attorney for Appellant
7900 N.W. 27th Avenue
149 West Plaza, Suite 210
Miami, Florida 33147
Telephone: [305] 693-6810

FILED FOR RECORD

80 JAN 30 P 2: 54

RICHARD P. BRINKER
CLERK, CIRCUIT & COUNTY COURTS
DADE COUNTY, FLA.

IN THE CIRCUIT COURT FOR
DADE COUNTY, FLORIDA
PROBATE DIVISION

IN RE: GUARDIANSHIP OF
NORMA B. TURNER,

File Number 80-813
Division 02

Incompetent

THESE LETTERS DO NOT AUTHORIZE ENTRY INTO ANY SAFE DEPOSIT BOX WITHOUT FURTHER ORDER OF COURT.

THESE LETTERS DO NOT AUTHORIZE ENTRY INTO ANY SAFE DEPOSIT BOX WITHOUT FURTHER ORDER OF COURT.

LETTERS OF GUARDIANSHIP
OF THE PERSON AND PROPERTY

TO ALL WHOM IT MAY CONCERN:

WHEREAS, DENIS DEAN has been appointed guardian of the person and property of NORMA B. TURNER, incompetent, and has taken the prescribed oath and performed all other acts necessary to qualify as such guardian:

NOW, THEREFORE, I, the undersigned judge of the above entitled court, declare DENIS DEAN duly qualified under the laws of the State of Florida to act as the guardian of the person and property of NORMA B. TURNER, incompetent, with full power to have the care, custody and control of said incompetent, to administer the estate of said incompetent according to law, and to take possession of and to hold, for the benefit of said incompetent, all the property of said incompetent, and of the rents, income, issues, and profits from it.

WITNESS my hand and the seal of this court this 30th day of January, 1980.

Gene Williams
Circuit Judge

STATE OF FLORIDA
COUNTY OF DADE
I, THE UNDERSIGNED, Deputy Clerk, Circuit Court, Dade County, Florida, DO HEREBY CERTIFY the within and foregoing is a true and correct copy of the original as it appears of record and file in the office of the Circuit Court, Dade County, Florida, and that same is in full force and effect.
WITNESS my hand and Seal of the Circuit Court, this 5 day of June A.D. 19 80

RICHARD P. BRINKER
Clerk Circuit Court
By Anne Lewis
Deputy Clerk Circuit Court

RECORDED
FEB 4 1980
RICHARD P. BRINKER
CLERK

OR 10639 PG 605

Form G-1.072
© The Florida Bar 1977

RECEIVED
MAR 15 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

CASE NO. 81-5827

IN RE: NORMA TURNER

Appellant.

/

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF FLORIDA)
:SS
COUNTY OF DADE)

I, FRANK REPENSEK, being first duly sworn, depose and say that I am the Executive Director of the GUARDIANSHIP PROGRAM OF DADE COUNTY, INC., the duly appointed legal guardian of the person and property of NORMA TURNER, (a certified copy of the Letters of Guardianship is attached hereto and made a part hereof), the Appellant in the above-entitled case; that in support of the Motion to Proceed on Appeal without being required to prepay fees, costs or give security therefor, I state that because of her poverty NORMA TURNER is unable to pay the costs of said proceeding or to give security therefor; that I believe she is entitled to redress; and that the issue desired to be presented on appeal is the following:

Whether the "Adult Protective Services Act," Chapter 410 of the Florida Statutes, is violative of the Due Process Clause of the Fourteenth Amendment and the right to privacy provided by the United States Constitution.

I further swear that the responses which I have made to the questions and instructions below relating to NORMA TURNER's ability to pay the costs of prosecuting the appeal are true.

1. Are you presently employed?

   NORMA TURNER is presently unemployed. The date of her last employment is unknown to me; it preceeded the guardianship and NORMA TURNER is unable to provide it. It is at least two years ago as the guardianship has been in existence that long. Since NORMA TURNER is quite frail and elderly I surmise that it was many years ago.

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

The source of income and amount received during the past twelve months by NORMA TURNER is: $307.00 per month in Social Security Old Age Assistance payments. Also some interest received on the accounts listed below.

3. Do you own any cash or checking or savings account?

NORMA TURNER's accounts are as follows: Trust Account $6,199.99 at Southeast First National Bank of Miami; $10,000.00 savings certificate at Biscayne Federal of Miami.

The $307 monthly Social Security check is totally expended for NORMA TURNER's maintenance in Jackson Manor Nursing Home in Miami which costs $1,400.00 per month. Therefore, approximately $1,100.00 per month is withdrawn from her accounts to maintain her in the nursing home. Consequently, after approximately 13 months has elapsed NORMA TURNER's funds will be totally exhausted and she will have to go on public assistance in the form of Medicaid. If the costs and fees of this proceeding are paid out of her estate she will be come a public charge on Medicaid proportionately sooner. The reason why the guardianship was transferred from Mr. Dennis Dean to the Public Guardianship Program was to save on expenses, conserve the estate, and delay the date that NORMA TURNER will become a public charge.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

NORMA TURNER has no dependents.

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

FRANK REPENSEK, Affiant

SWORN TO AND SUBSCRIBED before me this 8th day of March, 1982.

NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES OCT. 12 1984
BONDED THRU GENERAL INS. UNDERWRITERS

NOTARY PUBLIC, STATE OF FLORIDA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of March, 1982, a true and correct copy of the foregoing was mailed, postage prepaid to: KENT A. ZAISER, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32304, LEONARD HELFAND, Esquire, Department of Health and Rehabilitative Services of the State

of Florida, District XI, 401 N. W. 2nd Avenue, Miami, Florida 33125, and JANET RENO, State Attorney, 1351 N. W. 12th Street, Miami, Florida 33125. I FURTHER CERTIFY that all parties required to be served were served.

LEGAL SERVICES OF GREATER
MIAMI, INC.

BY _____

LESTER C. WISOTSKY
COUNSEL FOR APPELLANT
Law Center North
7900 N. W. 27th Avenue
149 West Plaza, Suite 210
Miami, Florida 33147
Telephone (305)693-6810

P11D

FILED FOR RECORD
1982 JAN 25 PM 3:49
RICHARD P. BRINKER
CLK CIRCUIT & COUNTY CTS
DADE COUNTY, FLORIDA

IN THE CIRCUIT COURT FOR
DADE COUNTY, FLORIDA
PROBATE DIVISION

IN RE: GUARDIANSHIP OF

NORMA B. TURNER

Incompetent

File Number 80-813
Division 02

LETTERS OF GUARDIANSHIP
OF THE PERSON AND PROPERTY

TO ALL WHOM IT MAY CONCERN:

WHEREAS, GUARDIANSHIP PROGRAM OF DADE COUNTY, INC. has been appointed guardian of the person and property of NORMA B. TURNER, incompetent, and has taken the prescribed oath and performed all other acts necessary to qualify as such guardian:

NOW, THEREFORE, I, the undersigned judge of the above entitled court, declare GUARDIANSHIP PROGRAM OF DADE COUNTY, INC. duly qualified under the laws of the State of Florida to act as the guardian of the person and property of NORMA B. TURNER, incompetent, with full power to have the care, custody and control of said incompetent, to administer the estate of said incompetent according to law, and to take possession of and to hold, for the benefit of said incompetent, all the property of said incompetent, and of the rents, income, issues, and profits from it.

WITNESS my hand and the seal of this court this 25 day of Jan, 1982

These Letters do not authorize the sale of any assets without special Order of Court.

Circuit Judge

STATE OF FLORIDA
COUNTY OF DADE
I, THE UNDERSIGNED, Deputy Clerk, Circuit Court, Dade County, Florida, DO HEREBY CERTIFY the within and foregoing is a true and correct copy of the original as it appears on record and file in the office of the Circuit Court, Dade County, Florida, and that same is in full force and effect.
WITNESS my hand and official seal of said Circuit Court at Miami, Florida, this 26th day of Jan A.D. 1982
RICHARD P. BRINKER
Clerk Circuit Court
By Gloria de la Campa
Deputy Clerk Circuit Court

Form G-1.072
©The Florida Bar 1977

Motion to Dismiss or Affirm

RECEIVED
FEB 19 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 81-5827

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

IN RE: NORMA TURNER

On Appeal from the Supreme Court of Florida

APPELLEE'S MOTION TO DISMISS OR AFFIRM

Jim Smith
Attorney General

Kent A. Zaiser
Assistant Attorney General
Counsel of Record

Department of Legal Affairs
The Capitol, Suite 1501
Tallahassee, Florida 32301
(904) 488-9935

Attorneys for the Appellee
State of Florida Department
of Health and Rehabilitative
Services

MOTION TO DISMISS OR AFFIRM

The Appellee State of Florida Department of Health and Rehabilitative Services hereby moves this Court to dismiss this cause or, in the alternative, to affirm the decision of the Supreme Court of Florida below reported at 402 So.2d 383 (Fla. 1981) on the grounds that this cause is not within the jurisdiction of this Court in that it is moot as to the parties hereto, that this cause does not present a substantial federal question, and that this cause was not taken in conformity with the Rules of the Supreme Court of the United States.

Respectfully submitted,

Jim Smith
Attorney General

Kent A. Zaiser
Assistant Attorney General
Counsel of Record

Department of Legal Affairs
The Capitol, Suite 1501
Tallahassee, Florida 32301
(904) 488-9935

Attorneys for the Appellee
State of Florida Department
of Health and Rehabilitative
Services

TABLE OF CONTENTS

	PAGE
MOTION TO DISMISS OR AFFIRM	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	1
ARGUMENT	2
THIS COURT LACKS JURISDICTION OVER THIS CAUSE IN THAT IT IS MOOT AS TO THE PARTIES	3
THIS CAUSE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION	5
THIS CAUSE IS NOT IN CONFORMITY WITH THE RULES OF THIS COURT IN THAT THE APPELLANT'S AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS DOES NOT COMPLY WITH RULE 46.1	10
CONCLUSION	11

TABLE OF AUTHORITIES

CASES	PAGE
Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)	7, 8, 9
Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed.2d 617 (1937)	3
Application of the President & Directors of Georgetown College, Inc., 331 F.2d 1010 (D.C. Cir. 1964)	9
DeFunis v. Odegaard, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974)	4
Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972)	9
Humphrey v. Cody, 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972)	7

PAGE

In Re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) 5, 6, 7

In Re Herbert Byrne & Norma Turner, 402 So.2d 383 (Fla. 1981) i

Liner v. Jafco, 375 U.S. 301, 84 S.Ct. 391, 11 L.Ed.2d 347 (1964) 4

North Carolina v. Rice, 404 U.S. 244, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971) 3

O'Connor v. Donaldson, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975) 7, 8

Parham v. J.R., 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) 7, 9

Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969) 5

Preiser v. Newkirk, 422 U.S. 395, 95 S.Ct. 2330, 45 L.Ed.2d 272 (1975) 4

Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) 5, 9

Securities & Exchange Comm'n v. Medical Comm. for Human Rights, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed.2d 560 (1972) 4

Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967) 7

Steffel v. Thompson, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) 4

United States v. Munsingwear, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950) 4

CONSTITUTIONS

Art. III, U.S. Const. 4

Art. V, Sec. 3(b)(5), Fla. Const. 4

Art. V, Sec. 3(b)(1), Fla. Const. (1972) 6

Fourteenth Amend., Sec. 1, U.S. Const. 2

MISCELLANEOUS

Form 4, Fed. R. App. P. 10

PAGE

RULES

Rule 16.1(a), R. U.S. Sup. Ct. 10

Rule 46.1, R. U.S. Sup. Ct. 10

STATUTES

28 U.S.C. §1915 11

28 U.S.C. §1257(2) 3

Secs. 410.10-.11, Fla. Stat. 2

Sec. 410.104, Fla. Stat. 2, 3, 5, 6, 8, 9, 10, 11

PRELIMINARY STATEMENT

The Appellant Norma Turner was the Respondent in the trial court, the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, and was the Appellant in the Supreme Court of Florida. She is referred to herein by name or as the Appellant. The Appellee State of Florida Department of Health and Rehabilitative Services was the Petitioner in the trial court and was the Appellee in the Supreme Court of Florida. It is referred to herein by name or as the Appellee.

STATEMENT OF THE CASE

The Appellee agrees with the Statement of the Case in the Appellant's Jurisdictional Statement, but would call to the attention of this Court that the transcript of the proceedings in the trial court contained in the Appellant's Appendix as pages 20 through 75 was not a part of the record on appeal in the Supreme Court of Florida. See the Order Permitting Respondent to Proceed on Appeal as Indigent, Appellant's Appendix pp. 17&18. As a result, it may not be relied on by the Appellant in this cause on appeal from that court.

The Appellee would also note that this cause was consolidated in the Supreme Court of Florida with a similar cause brought by Norma Turner's uncle, Herbert Byrne, who has since died. See the Opinion of the Supreme Court of Florida, Appellant's Appendix, pp. 76&77.

ARGUMENT

The sole issue raised by the Appellant's Jurisdictional Statement for plenary review by this Court is whether the Florida Adult Protective Services Act, Sections 410.10-410.11, Florida Statutes, is in violation of due process of law as guaranteed by Section 1 of the Fourteenth Amendment to the United States Constitution and the constitutional right to privacy as established by the courts. Actually, the issue as stated by the Appellant attempts to expand this Court's review beyond that of the courts below inasmuch as they only passed upon the constitutionality of Section 410.104, Florida Statutes. The trial court expressly passed only upon the constitutionality of Section 410.104, as asserted as the basis for the Appellant's Motion to Dismiss. See Appellant's Appendix pp. 6&7 and 9&10. Furthermore, the Supreme Court of Florida, although considering the procedures provided in the entire Florida Adult Protective Services Act, expressly upheld only the constitutionality of Section 410.104 in affirming the trial court's denial of the Appellant's Motion to Dismiss. In particular, the Supreme Court of Florida stated in its Opinion as follows:

> "These consolidated cases are before the Court on appeal from judgments of the Circuit Court of the Eleventh Judicial Circuit, in Dade County, which upheld the constitutionality of section 410.104, Florida Statutes (1979)."
>
> * * *
>
> "The section under consideration is part of the Adult Protective Services Act, §§ 410.10-410.11. Fla.Stat. (1979)."
>
> (Emphasis added.)
> Appellant's Appendix, pp. 76&77.

Consequently, this Court's review should be limited to the single statutory section ruled upon below.

THIS COURT LACKS JURISDICTION OVER THIS CAUSE IN THAT IT IS MOOT AS TO THE PARTIES

The Appellant has invoked the jurisdiction of this Court pursuant to 28 U.S.C. §1257(2) to review by appeal a decision of the highest court of a state declaring valid a state statute allegedly repugnant to the United States Constitution. Notwithstanding the appellate jurisdiction of this Court to review such decisions, this Court lacks jurisdiction over this cause in that there is no longer a present and actual case or controversy between the parties of an adversary nature or character admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. North Carolina v. Rice, 404 U.S. 244, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971); and Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed.2d 617 (1937).

Specifically, this cause is moot for two reasons. Initially, the trial court found that the Appellee had failed to meet its burden of proof to establish probable cause that the Appellant was suffering from the infirmities of aging, it dismissed the petition for emergency custody, it entered a final judgment of acquittal, and it ordered the Appellant released and discharged from temporary custody. Appellant's Appendix, p. 12. No further commitment proceedings or custody ensued. The Supreme Court of Florida, in its Opinion affirming the trial court, also noted the trial court's final disposition favorable to the Appellant. Appellant's Appendix, p. 77. Secondly, subsequent to the final order of the trial court, the Appellant was adjudicated incompetent. Appellant's Appendix, p. 77. In either event, there is no continuing jurisdiction of the Appellee over the Appellant and she is no longer subject to the statute challenged.

In effect, there is, and has not been since the final order of the trial court, any dispute between the parties or rights remaining to be determined between them. The Supreme Court of Florida recognized the mootness of the dispute but nevertheless elected by a split decision to exercise its jurisdiction "since this is a matter of great public importance in the administration of the law and is of general interest to the public", pursuant to Article V, Section 3(b)(5), Florida Constitution. Appellant's Appendix, p. 77. Three members of the Court would have dismissed the appeal as moot. Appellant's Appendix, p. 79.

It is undisputed that the exercise of the judicial power of the United States derives from the Article III of the United States Constitution which requires the existence of a case or controversy. Preiser v. Newkirk, 422 U.S. 395, 95 S.Ct. 2330, 45 L.Ed.2d 272 (1975); and Liner v. Jafco, 375 U.S. 301, 84 S.Ct. 391, 11 L.Ed.2d 347 (1964). It is a threshhold question beyond which federal courts may not proceed without satisfactory resolution, and the existence of a case or controversy at the outset of a proceeding below does not necessarily preserve the jurisdiction of this Court on review. The rule in federal cases is that an actual controversy must exist at all stages of review, not merely at the time the action is initiated. Steffel v. Thompson, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974); Securities & Exchange Comm'n v. Medical Comm. for Human Rights, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed.2d 560 (1972); and United States v. Munsingwear, Inc., 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950). The rule applies equally to cases originally arising in state courts, and it is immaterial that under state law a case might be saved from mootness by great public interest in the issues, as here. DeFunis v. Odegaard, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974). Simply stated, a case is moot

when the issues are no longer live or the parties lack a legally cognizable interest in the outcome. Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969).

The uncontroverted facts of this cause establish that there remains no real and substantial controversy touching the legal relations of the parties. Clearly, the Appellant has no continuing personal stake in the outcome of the controversy. In fact, she would be totally unaffected by the decision of this Court in this cause. See Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). Consequently, this Court has no jurisdiction over this cause and should dismiss or decline to consider it as moot.

THIS CAUSE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The Appellant urges this Court to note probable jurisdiction in this cause because the Florida Adult Protective Services Act fails to comport with due process of law as set forth in numerous decisions of this Court. The Appellee submits that, if this Court should find this cause is not moot, a substantial federal question is not raised herein in that either Section 410.104 does not deprive an individual subject thereto of due process or that the Appellant was not deprived of due process thereunder.

The Appellee does not quarrel with the Appellant's reliance on In Re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), to show the fundamental significance of due process in the American legal and social order. There are significant distinctions, however, between In Re Gault and the instant cause. In Re Gault concerned the commitment of a juvenile as a

delinquent to an industrial school. The hearing, which resulted in the juvenile's long-term commitment, was conducted on the day after he was taken into custody, without written notice of the hearing or the factual basis for commitment, without sworn witnesses or a record of the proceedings, without the testimony of the complainant or disclosure of a referral report by probation officers, without confrontation by adverse witnesses or cross-examination, without advice of the right to counsel or the right against self-incrimination, and without the right to appeal. There this Court found that the constitutional guarantee of due process was applicable to such proceedings and was violated. The procedure and result achieved in the instant cause differ markedly from In Re Gault. The initial custody of the Appellant was initiated by an ex parte judicial order based on the personal observation and agreement of a representative of the Appellee and a law enforcement officer, following a request for assistance by the Appellant's uncle, evidenced by a sworn, notarized petition. Appellant's Appendix, pp. 1&2 and 76&77. The trial court noticed in writing a hearing within 48 hours, as required by Section 410.104, and appointed counsel for the Appellant. Appellant's Appendix, pp. 3-5. The hearing solely to establish probable cause for protective placement of the Appellant for up to four days, unlike In Re Gault which was for long-term commitment for the protection of others, and was promptly conducted with counsel, a court reporter, sworn testimony, the right of confrontation and cross-examination. Moreover, the Appellant was found not to be suffering from the infirmities of aging and dismissed from custody, from which she appealed pursuant to Article V, Section 3(b)(1), Florida Constitution (1972). Appellant's Appendix, pp. 12 and 76-79. If, however, the trial court had found probable cause to protect

the Appellant, it could have ordered her temporary placement for up to four days pending another hearing on the need for continuing services. Obviously, the nature of the cases, the procedures followed, and the results achieved in In Re Gault and the instant cause are widely dissimilar. The Appellant's Jurisdictional Statement even admits that she was afforded procedural due process sub judice. Jurisdictional Statement, p. 6.

The Appellant also relies without discussion on Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967); Humphrey v. Cody, 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972); O'Connor v. Donaldson, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975); Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979); and Parham v. J.R., 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979). Each of these cases is either distinguishable from or inapplicable to this cause. Specht v. Patterson, supra, held a Colorado sex offenders' statute constitutionally deficient for failure to provide for a hearing and for the right of confrontation by witnesses. The offender was sentenced to an indeterminate term of one day to life, although he was convicted of a sex offense for which a maximum sentence of ten years could be imposed. The Appellant cites Humphrey v. Cody, supra, for the proposition that the deprivation of liberty under a state's involuntary commitment law constitutes a massive curtailment of liberty. In Humphrey, like Specht, the petitioner was convicted of a crime punishable by a maximum one year sentence and then committed for an indefinite period to a deviate sex facility pursuant to a Wisconsin sex crimes act. He asserted that his commitment was essentially the equivalent of commitment under another state statute on mental health guaranteeing a jury determination of commitment, that he was deprived of due process and equal protection by being confined in

the state prison rather than a mental hospital, and that he was denied the effective assistance of counsel and the right to confront witnesses. This Court remanded to the federal District Court for an evidentiary hearing on the petitioner's claims.

The Appellant relies on O'Connor v. Donaldson, supra, to show that involuntary commitment to a mental hospital or involuntary commitment for any reason is a deprivation of liberty which cannot be made without due process. The Appellee agrees with the principle stated but avers that due process is guaranteed by Section 410.104 and was accorded to the Appellant herein. In fact, O'Connor held that a wholly sane and innocent person has a constitutional right not to be physically confined by a state when his freedom will pose a danger neither to himself nor to others. Consistent with O'Connor, Section 410.104 is an attempt to determine by constitutional means whether an otherwise free person is likely to incur a substantial risk of life-threatening physical harm or deterioration and should be temporarily placed in protective custody for his own good. In Addington v. Texas, supra, the issue was whether the standard of proof for the indefinite hospitalization of an individual for mental illness was clear and convincing evidence or proof beyond a reasonable doubt. This Court unanimously agreed that the standard was clear and convincing evidence, an issue which has never been raised here. This Court also recognized again in Addington that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. The Appellee is in agreement and submits that Section 410.104 is not violative of due process, as the Supreme Court of Florida concluded.

Parham v. J.R., supra, concerned Georgia's procedures for voluntary admission of children to state administered mental health facilities at the request of the parents or the state. Essentially, this Court upheld the state procedures stating that due process requires an inquiry by a neutral factfinder whether the state's admission requirements are met. The case is not applicable sub judice, although the neutral factfinder requirement is met by Section 410.104.

The Appellant also argues that Section 410.104 exceeds the parens patriae power of the state recognized in Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972). In Addington v. Texas, supra, this Court stated that the state has a legitimate interest under its parens patriae power in providing care to its citizens who are unable to care for themselves because of emotional disorders, and presumably physical disorders as well. Citing only several unpersuasive and non-binding state court cases, the Appellant also urges that Section 410.104 violates the unwritten constitutional right to privacy. The state court cases relied on by the Appellant for this proposition concern a patient's right to refuse medical treatment and against unwanted infringement of bodily integrity. There is no evidence in this cause, however, that such unwanted medical treatment was imposed upon the Appellant, but rather only temporary protective custody intended to preserve the Appellant's life or physical condition consistent with the right to privacy and the countervailing state interest expressed in Roe v. Wade, supra. The Appellant also relies on a dissenting Opinion by now Chief Justice Burger in Application of the President & Directors of Georgetown College, Inc., 331 F.2d 1010 (D.C. Cir. 1964), disapproving of an Order by the District Court granting permission to administer blood transfusions to an

emergency patient. Ironically, Chief Justice Burger would have dismissed the case for want of a justiciable controversy, as the Appellee urges here. The facts and the law of that case are easily distinguished from the instant case, and, even if they were not, certainly a dissenting Opinion in the Circuit Court of Appeals which would deny a petition for rehearing en banc should not be binding or persuasive in this cause.

In summary, Section 410.104 is a well-conceived, well-intentioned scheme for purely temporary and short-term emergency protection of the aged from abuse, maltreatment, or neglect which is likely to result in substantial risk of life-threatening physical harm or deterioration if not immediately removed from their surroundings. The procedures provided in the statute and accorded to the Appellant here comport with minimal due process, as found by the Supreme Court of Florida, and do not present a substantial federal question worthy of review by this Court. Therefore, this Court should dismiss this cause or affirm the decision of the Supreme Court of Florida.

THIS CAUSE IS NOT IN CONFORMITY WITH THE RULES OF THIS COURT IN THAT THE APPELLANT'S AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS DOES NOT COMPLY WITH RULE 46.1

This Court has determined that an appeal may be dismissed if not taken in conformity with its rules. Rule 16.1(a), Rules of the United States Supreme Court. The Appellee has filed her Jurisdictional Statement as a proceeding in forma pauperis, yet she has failed to comply with Rule 46.1, Rules of the United States Supreme Court, in that her Affidavit in Support of Motion for Leave to Proceed in Forma Pauperis is not in the form prescribed in Form 4, Federal Rules of Appellate Procedure,

setting forth with particularity facts showing she comes within the statutory requirements therefor. See 28 U.S.C. §1915. Accordingly, this appeal should be dismissed.

CONCLUSION

For the foregoing reasons, the Appellee State of Florida Department of Health and Rehabilitative Services respectfully requests this Court to dismiss this cause or, in the alternative, to summarily affirm the decision of the Supreme Court of Florida declaring constitutional Section 410.104, Florida Statutes, part of the Florida Adult Protective Services Act.

Respectfully submitted,

Jim Smith
Attorney General

Kent A Zaiser

Kent A. Zaiser
Assistant Attorney General
Counsel of Record

Department of Legal Affairs
The Capitol, Suite 1501
Tallahassee, Florida 32301
(904) 488-9935

Attorneys for the Appellee
State of Florida Department
of Health and Rehabilitative
Services

Appellant's Reply Brief

MAR 19 PAGE 7

RECEIVED
MAR - 2 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-5827

IN RE: NORMA TURNER

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

LESTER C. WISOTSKY
COUNSEL FOR APPELLANT
LEGAL SERVICES OF GREATER MIAMI, INC.
NORTHSIDE SHOPPING PLAZA
7900 N. W. 27th Avenue
149 West Plaza, Suite 210
Miami, Florida 33147
Telephone (305)693-6810

APPELLANT'S BRIEF IN OPPOSITION TO

APPELLEE'S MOTION TO DISMISS OR AFFIRM

Appellant, NORMA TURNER, by and through undersigned counsel, pursuant to Rule 16(4) of the Rules of this Court, files this Brief in Opposition to Appellee's Motion to Dismiss or Affirm.

Respectfully submitted,

LEGAL SERVICES OF GREATER
MIAMI, INC.

BY _____

LESTER C. WISOTSKY
COUNSEL FOR APPELLANT
LAW CENTER NORTH
NORTHSIDE SHOPPING PLAZA
7900 N. W. 27th Avenue, Suite 21
149 West Plaza
Miami, Florida 33147
Telephone - (305)693-6810

TABLE OF CONTENTS

	PAGE
APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	ii
RESPONSE TO APPELLEE'S STATEMENT OF THE CASE	1
RESPONSE TO APPELLEE'S SECTION ENTITLED "ARGUMENT"	1
THIS CAUSE IS NOT MOOT	1
THE QUESTION IS SUBSTANTIAL	5
IN FORMA PAUPERIS MOTION	6
CONCLUSION	7

TABLE OF AUTHORITIES

CASES

BECKHAM V. CLINE, 105 So.2d 419 (Fla. 1942)	4
EISENSTADT V. BAIRD, 405 U.S. 438 (1971)	6
GRISWOLD V. CONNECTICUT, 381 U.S. 479 (1965)	6
HARMS V. MIAMI DAILY NEWS, 127 So.2d 715 (Fla. 3d DCA 1961)	4
IN RE GAULT, 387 U.S. 1 (1967)	5
MIAMI V. ALBRO, 120 So.2d 23 (Fla. 4th DCA 1980)	4
ROE V. WADE, 410 U.S. 113 (1973)	2,3,6
SEC V. MEDICAL COMMITTEE FOR HUMAN RIGHTS, 404 U.S. 403 (1972)	2
SEC V. SLOAN, 436 U.S. 103 (1978)	2
SIBRON V. NEW YORK, 392 U.S. 40 (1968)	3,4
SOSNA V. IO[illegible], 419 U.S. 393 (1975)	2,4

CASES	PAGE
SOUTHERN PACIFIC TERMINAL CO. V. ICC, 29 U.S. 498 (1911)	2
STANLEY V. GEORGIA, 394 U.S. 393 (1975)	6
WEINSTEIN V. BRADFORD, 423 U.S. 147 (1975)	2
WHITE V. PADGETT, 475 F.2d 79 (5th Cir. 1973)	4
YOUNGER V. HARRISS, 401 U.S. 37 (1971)	4
CONSTITUTIONAL PROVISIONS	
ARTICLE III, UNITED STATES CONSTITUTION	2
RIGHT TO PRIVACY, UNITED STATES CONSTITUTION	6
STATUTES	
28 U.S.C. § 1915	6
§ 410.10-410.11 Fla. Stat., Adult Protective Services Act	1
§ 410.104 Fla. Stat.	1,6
§ 410.104(3) Fla. Stat.	2,4
§ 410.104(4) Fla. Stat.	2,4,5
RULES	
Rule 46.1, United States Supreme Court Rules	6
MISCELLANEOUS	
Form 4, Federal Rules of Appellate Procedure	6

P11B3

RESPONSE TO APPELLEE'S STATEMENT OF THE CASE

Counsel for the Appellee asserts that the "transcript of the proceedings in the trial court contained in the Appellant's Appendix as pages 20 through 75 was not a part of the record on appeal in the Supreme Court of Florida." This simply is not true. The Order Permitting Respondent to Proceed on Appeal as Indigent (App., pp.17-18) provides, "there is no need for a transcript of the hearing ... until the Appellate Court determines whether there is standing to bring the appeal, and the state shall not pay for the transcription of said hearing until the Appellate Court determines that it will hear the appeal on its merits ... ." The Florida Supreme Court determined to hear the case on the merits and the hearing transcript (App., pp.20-75) was in fact made a part of the record on appeal in the Florida Supreme Court, and is properly presented to this Court for its disposition of this proceeding.

RESPONSE TO APPELLEE'S SECTION ENTITLED "ARGUMENT"

Counsel for Appellee argues that Appellant has attempted to have this Court expand the review of the proceedings below from § 410.104 Fla. Stat. only, to the entire Adult Protective Services Act, §§ 410.10-410.11 Fla. Stat. While it is true that the trial court expressly passed only on the constitutionality of § 410.104 Fla. Stat., the Florida Supreme Court considered provisions contained throughout the Act. The Florida Supreme Court found consideration of § 410.104 Fla. Stat. alone in isolation inappropriate, and resort to the other provisions of the Act with which the section must be read together, essential to a determination of the issues with respect to the constitutionality of § 410.104 itself. Appellee only seeks review accordingly.

THIS CAUSE IS NOT MOOT

Counsel for Appellee argues this Court lacks jurisdiction over this cause because it has become moot for two reasons. Counsel for Appellee first argues this cause is moot because the trial court found that Appellee had failed to meet its burden of proof to establish probable cause that the Appellant was suffering from the infirmities of aging, and entered a Final Judgment of Acquittal - Order of Discharge,

ordering the Appellant released and discharged from custody. (App., p.12) Second, Appellant asserts this cause has become moot because Appellant has now been adjudged incompetent (App., p.77).

It is undisputed that the judicial power of the United States derives from Article III of the United States Constitution which requires the existence of a case or controversy for the exercise of that judicial power.

And it is true that the existence of a case or controversy at the outset of a proceeding below does not necessarily preserve the jurisdiction of a reviewing court. The general rule is that an actual controversy must exist at all stages of review, not merely at the time the action is initiated. SEC v. Medical Committee for Human Rights, 404 U.S. 403 (1972).

However, there is a major exception to this rule first enunciated in Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911). When a case becomes moot during its pendency, a federal court nevertheless retains its jurisdiction to hear the matter when it is capable of repetition, yet evading review. See, e.g., Roe v. Wade, 410 U.S. 113, 125 (1973). When a challenged action is in its duration too short to be fully litigated prior to its cessation or expiration and there is a reasonable expectation that the same complaining party would be subject to the same action again, the court retains and is not divested of its jurisdiction. SEC v. Sloan, 436 U.S. 103, 109 (1978); Weinstein v. Bradford, 423 U.S. 147, 149 (1975); Sosna v. Iowa, 419 U.S. 393, 398-402 (1975).

It is submitted that the instant action meets these criteria. The first criteria is met in that the periods of involuntary detention involved in § 410.104(3) and (4) are in duration too short for the elderly individual being proceeded against ever to remain in detention through appeal. Only if an elderly person were adjudicated to be suffering the infirmities of aging and in need of "continuing services" could there be any possibility that he would remain held involuntarily during appeal. Even in such instances, it is extremely unlikely that the elderly person would remain in involuntary custody for a period sufficient for an appellant adjudication of the issues presented herein, particularly in view of the fact that the Florida Supreme Court construed and limited

"continuing services" to apply in instances only so long as a situation of life-threatening harm exists. (App., pp.79)

In short, the claims of the taking of liberty without due process of law under the statute here in question can never be fuliy litigated while the elderly individual remains in involuntary custody, but only after release. Appellate review will thereby be effectively denied, if this case is considered moot.

The second criteria, that there is a reasonable expectation tha. the same complaining party would be subjected to the same action again is likewise met by the case at bar. There is every reason to believe that the state would again proceed against Appellant as an elderly individual suffering from the infirmities of aging. Though she has been adjudicated incompetent, that is not necessarily permanent, she may have her competency restored, and again be subject to an Adult Protective Services Act proceeding. It is submitted that it is just as reasonable to think that Appellant may once again become subject to confinement by the state under the Adult Protective Services Act as it was that Ms. Roe (in Roe v. Wade, supra) would become pregnant again and desire an abortion.

If, however, this Court determines that Appellant fail to adequately meet this second criteria, then this Court should apply the reasoning utilized in Sibron v. New York, 392 U.S. 40 (1968). In Sibron, a criminal case, the Court held even though a defendant had been released after fully serving a six month sentence, that the appeal attacking his conviction on federal constitutional grounds was not moot where there was no way for him to bring his case to this Court before his six month sentence expired. This Court ruled that the mere release of a prisoner does not mechanically foreclose the Court's consideration of the federal constitutional issues raised in the criminal case, the appeal of which was neither "abstract, feigned or hypothetical." The Court stated,

> We do not believe that the Constitution contemplates that people deprived of constitutional rights at this level should be left utterly remedyless and defenseless against repetitions of unconstitutional conduct.

392 U.S. at 52-53.

In the instant case, Appellant's involuntary confinement should be equated with Sibron's short-term sentence that could not be appealed prior to its termination, and this Court likewise should hold this case not to be moot. Further, Appellant does in fact have a present interest in the procedures attacked herein. She remains aggrieved by the period of time she was held prior to release, and if that detention is determined by this Court to be unlawful, then state causes of action for damages for the unlawful detention exist. Miami v. Albro, 120 So.2d 23 (Fla. 4th DCA 1960); Beckham v. Cline, 10 So.2d 419 (Fla. 1942); White v. Padgett, 475 F.2d 79 (5th Cir. 1973). See also, Harms v. Miami Daily News, 127 So.2d 715 (Fla. 3d DCA 1961).

This Court should pay careful attention to the difficulty of obtaining federal review of the issues presented herein. Because an Adult Protective Services Act proceeding is brought by the state against an individual, mootness cannot be avoided by the class action device outlined in Sosna v. Iowa, supra. And because of the doctrine of comity enunciated in Younger v. Harriss, 401 U.S. 37 (1971), and elaborated in its progeny, a simultaneous civil action in federal court to declare the Adult Protective Services Act scheme unconstitutional and to restrain the state court proceeding is not possible. If this Court refuses to hear this appeal, federal court review of the substantial federal issues presented herein will be effectively denied and foreclosed, not only in the case at bar, but in practicality, forever.

No elderly individual will be involuntarily held under the Act for a sufficient period of time to litigate its constitutionality. The elderly individual is held up to 48 hours (excluding Saturdays, Sundays, and legal holidays), at which time a preliminary hearing must be held to establish probable cause for grounds for protective placement (§ 410.104 (3));[1] up to another four days pending a hearing for a need for continuing services (§ 410.104(4)); and only so long thereafter as the

---

[1]Counsel for Appellant wishes to make clear that we are not challenging the pre-hearing detention for up to 48 hours, on an ex-parte petition, prior to the preliminary hearing, but only the failure to afford due process rights at the preliminary hearing itself, and in the hearing on the need for continuing services.

situation of life-threatening harm exists under continuing services (App., p.79). These time periods are simply too short in duration to ever allow litigation of the issues presented herein prior to the elderly individual's release from involuntary custody.

THE QUESTION IS SUBSTANTIAL

Counsel for Appellee distorts the facts in attempting to distinguish away In re Gault, 387 U.S. 1 (1967). In the instant case, as in Gault, there was no service of the petition on the person being proceeded against. While, in the instant case, a formal petition was prepared and a hearing noticed therein (App., pp.3-4), it was never served on Appellant. And, while counsel was appointed and did, in fact, represent Appellant, this is so only because counsel were made aware of the proceedings over the telephone by the social worker initiating the proceeding, and sought appointment, not because of statutory procedure. (App., p.26) Had counsel not been notified and sought appointment, Appellant would have gone unrepresented.[2]

As counsel for Appellee argues, the hearing held was for the purpose of establishing whether probable cause existed for protective placement, for up to four days. However, it is not true, as asserted by counsel for Appellee that the hearing in In re Gault, was necessarily for a long-term commitment. The particular proceeding in Gault resulted in a long-term commitment, but the duration of the commitment could have been for a lengthy or "lesser time."

Further, had the trial court found probable cause for protective placement for up to four days, § 410.104(4) Fla. Stat. sets forth another hearing on the need for continuing services of unspecified duration and length, which is again procedurally deficient in its failure to require notice and appointment of counsel. This failure to afford procedural due process presents a substantial federal question worthy of review by this Court.

---

[2]The importance of the appointment of counsel is underscored by the fact that only through the effective assistance of counsel was Appellant herein ordered discharged. Had counsel not intervened, another result was rather more likely.

With respect to the constitutional right to privacy, the issue presented to this Court is whether the state's interest in the protection of its inhabitants empowers the state to involuntarily remove elderly persons who are neither incompetent or even mentally ill from their homes and confine and order services for such elderly persons, pursuant to § 410.104 Fla. Stat. We submit that the constitutional right to privacy recognized by this Court in Griswold v. Connecticut, 381 U.S. 479 (1965); Stanley v. Georgia, 394 U.S. 557 (1969); Eisenstadt v. Baird, 405 U.S. 438 (1971); Roe v. Wade, 410 U.S. 113, 153 (1973), guarantees the individual's rights to free choice and self-determination and protects the decision to refuse services under the Adult Protective Services Act. Just as it protects the individual's right to refuse medical treatment as indicated in the cases cited in Appellant's Jurisdictional Statement, it protects the individual's right to refuse state services.

The question of whether the state's parens patriae power overcomes the individual's constitutional right to privacy to the extent provided for in the Adult Protective Services Act is a substantial federal question worthy of review by this Court.

IN FORMA PAUPERIS MOTION

Counsel for Appellee is correct that the Affidavit in Support of Motion to Proceed on Appeal In Forma Pauperis previously filed with this Court is not in the form prescribed by Form 4 of the Federal Rules of Appellate Procedure as required by Rule 46.1 of the Rules of this Court. However, it is in substantial compliance therewith, meeting the requirements of the previous In Forma Pauperis Rule (53), and it sets forth with particularity facts showing that Appellant comes within the statutory requirements of 28 U.S.C. § 1915. Consequently, dismissal is too severe a sanction.

Additionally, Appellant will shortly file an Affidavit In Support of Motion to Proceed On Appeal In Forma Pauperis, executed in conformity with the form prescribed by Form 4 of the Rules of Appellate Procedure.

Counsel for Appellant apologizes for this oversight. Any sanction therefor should not be visited upon Appellant or the consideration of the merits of her appeal.

CONCLUSION

For the reasons stated herein, and in Appellant's Jurisdictional Statement, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

LEGAL SERVICES OF GREATER
MIAMI, INC.

BY _____

LESTER C. WISOTSKY
COUNSEL FOR APPELLANT
LAW CENTER NORTH
NORTHSIDE SHOPPING CENTER
7900 N. W. 27th Avenue
149 West Plaza, Suite 210
Miami, Florida 33147
Telephone (305) 693-6810

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of February, 1982, a true and correct copy of the foregoing was mailed, postage prepaid to: KENT A. ZAISER, Assistant Attorney General, Department of Legal Affairs, the Capitol, Tallahassee, Florida 32304, LEONARD HELFAND, Esquire, Department of Health and Rehabilitative Services, District XI, 401 N. W. Second Avenue, Miami, Florida 33128, and JANET RENO, State Attorney, 1351 N. W. 12th Street, Miami, Florida 33125. I FURTHER CERTIFY that all parties required to be served were served.

_____
LESTER C. WISOTSKY
Counsel for Appellant

P11A